83-2050

Office - Supreme Court, U.S.
FILED
JUN 6 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PACIFIC POWER & LIGHT COMPANY,
PETITIONER,

V.

PUBLIC SERVICE COMMISSION OF WYOMING,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE WYOMING
SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

George D. Rives,
Counsel of Record
Leonard A. Girard
Stephen S. Walters
Nancy M. Ganong
Stoel, Rives, Boley,
Fraser & Wyse
900 SW Fifth Avenue
Portland, OR 97204
Telephone: (503) 224-3380

June 6, 1984

TABLE OF CONTENTS
OF APPENDIX

	Page
Pacific Power & Light Co. v. Pub. Serv. Comm'n, 677 P2d 799 (Wyo 1983)	1
Order Denying Rehearing, No. 83-75, (Wyo March 8, 1984)	73
Memorandum Opinion and Final Order, Dkt No. 9454 Sub 17 (Wyo PSC Dec. 2, 1982)	75
Missouri v. Pub. Serv. Comm'n, Case No. CV 183-1064cc (Mo Cir Ct April 16, 1984)	126
Ohio Edison Co., Case No. 81-898-EL-AEM (Ohio PUC July 31, 1981)	135
Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n, No. 79-1929 (Wis Ct App Dec. 22, 1981)	170

PACIFIC POWER & LIGHT COMPANY, a corporation, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

LOWER VALLEY POWER & LIGHT INC., Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

CHEMICAL BANK, a New York corporation, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, Appellant (Petitioner),

v.

The PUBLIC SERVICE COMMISSION OF WYOMING, Appellee (Respondent).

Nos. 83-75 to 83-78

Supreme Court of Wyoming.

Feb. 7, 1984

Rehearing Denied March 8, 1984 in No. 83-75

Before ROONEY, C. J., and THOMAS, ROSE, BROWN and CARDINE, JJ. ROONEY, Chief Justice.

This is an appeal from a district court ruling affirming an order of the Wyoming Public Service Commission (PSC) which denied appellants the right to recover in rates any and all investments, expenses or obligations related to three abandoned nuclear power construction projects.

We hold the matter to be moot as to all appellants except Pacific

Power & Light Company (PP&L), and we affirm the decision of appellee insofar as it pertains to PP&L.

There are four appellants. Appellant Lower Valley Power and Light, Inc. (LV) is a distribution level electric cooperative. Appellant PP&L is a publicly held corporation providing electric service as a regulated public utility. Both LV and PP&L are electric public utilities within the regulatory jurisdiction of the Wyoming PSC. Appellant Washington Public Power Supply System (WPPSS) is a joint operating agency which builds, owns and operates electric generation and transmission facilities and sells electric power to its members

and others. Appellant Chemical Bank (CB) is a New York corporation which is a bond-fund trustee.

LV and Fall River (FR), another distribution level electric cooperative which is not a party to this appeal, along with 86 other electric utility cooperatives, municipalities, and public utility districts, each signed, on July 14, 1976, identical Participants' Agreements (Agreements) which entitled them to a percentage share of power from two nuclear power projects (WNP-4 and WNP-5) which WPPSS was constructing in the state of Washington and which obligated them each to pay a proportion of the costs of said projects "whether or not" the projects were ever completed. PP&L was a 10% owner of WNP-5, and also

was participating in another nuclear power project known as Pebble Springs. WPPSS financed its ownership shares of WNP-4 and WNP-5 through the sale of municipal tax exempt bonds. CB is the bond-fund trustee for said bonds.

The Agreements executed by LV and FR were not submitted to the PSC for review or approval prior to their execution, or at any time subsequent.

Construction of WNP-4 and WNP-5 was begun in 1976 and abandoned in 1981, when WNP-4 was 16% complete and WNP-5 was 20% complete. The Pebble Springs project was terminated in 1982, with no construction ever being done, but with over $200 million invested in site preparation. No electric power will ever be generated by any of these three power plant projects.

The controversy was initiated by the PSC under its investigative powers pursuant to § 37-2-117, W.S. 1977[1] through a "Notice and Order Setting Hearing" made and entered on April 22, 1982 and directed to LV, PP&L and FR. The Commission Staff had previously petitioned the Commission to investigate the matter as to LV. Of course, the

---

[1] Section 37-2-117 provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same."

Commission could institute the investigation without such petition "summarily" and "of its own motion." It did so with its "Notice and Order Setting Hearing." The record amply reflects the waiver of any defect or objection in and to the investigation by PP&L. The scope of the investigation was also explored and understood by the parties, and the hearing proceeded on the issue of whether or not the investment, expenses and obligations incurred by PP&L and LV in the projects could be properly considered in fixing the rate base for their operation, and it did not proceed on the issue of what the rates should be, i.e., a rate case.

The transcript reflects that all parties recognized the correct issue

and that it would be pertinent to rates and the procedure and evidence would be similar to that of a rate case. The following occurred prior to the testimony of the first PP&L witness:

> "MR. ROGERS [Representing PSC Staff]: *** I do have one additional matter.
>
> "CHAIRMAN SMYTH: Yes.
>
> "MR. ROGERS: And that is concerning the filing by the company made on July 2, 1982, pursuant to the commission's order. The commission will recall that these matters were originally set for hearing on July 16th of 1982, pursuant to the commission order of April 22, 1982.
>
> "Upon the motion of the staff the hearings were continued until this week, and that was made pursuant to the commission's order of May 28, 1982. And contained within that order was a provision that all testimony by all parties was to be filed on or before July 2, 1982.

"Now, I don't know if the commission is aware, but as part of the company's filing on July 2, on or about July 2, they filed tariffs, and those tariffs contain a request for a change of rates in amounts variously set at $5,743,000, or $10,967,000. It was the staff's understanding at the beginning that this was to be a generic matter, that it was not to be a rate matter. The filing made by the company has changed that to a contested case.

"And the staff has concerns regarding the notice requirement of the Administrative Procedures Act, with regard to this matter. I am sure that the commission will recall its own rulings, that a rate making matter is a contested matter under the act, and the commission, or the act is very specific with regard to the notice required.

"And I think that this matter should be resolved by the commission in some way. I have broached the matter with Mr. Girard, and we are attempting to come up with some type of a solution to the problem,

but I think that the commission should be made aware of it prior to the beginning of this testimony.

"CHAIRMAN SMYTH: Mr. Girard, do you wish to respond to that?

"MR. GIRARD: Very briefly. Mr. Rogers is correct, he made me aware of this matter, I think it was five or six minutes before the hearing commenced this afternoon, so he and I didn't really have time to have a calm lawyer-like discussion of the problem. He agreed to raise it to bring it to your attention. The only thing I will say is this: The purpose of the generic proceeding, I believe, was to determine how to deal with the costs of the nuclear plants at issue.

"And the question the company had was: The generic proceeding presumably will consider how much was spent, why was it spent, was it reasonable, who bears the risk of that and so forth. And let us assume just for discussion, that the commission considered all that, and after deliberating said, 'We think the total

costs that should be borne by ratepayers are, say, $10 million a year for five years.'

"Then the question would get to be, 'What would then happen?' Presumably, if the company hadn't filed rates it could then file rates designed to achieve the level of revenues found appropriate by the commission. And we would then wonder, would we have a rate case in which every issue would be open again, and we would then retry the question of who should pay for the nuclear plants.

"We figured that the commission likely didn't want to do that, that this is the hearing to find out how that expenditure is going to be dealt with. There may be a question as to exactly how the--which particular ratepayer should pay for it, but we would think that there should be one time and one time only to decide, is that a stockholder responsibility, a ratepayer responsibility, or anywhere in between.

"That's all I have to say.

* * * * *

"CHAIRMAN SMYTH: We will come back to order.

"The commission feels very strongly, not just a little bit, that this was wrong, that we cannot have a rate case without giving notice to the public, and that any issues as to asking ratepayers to pay for amounts in the future, will be taken care of in future rate cases and will not be taken care of in this generic hearing which is to determine whether or not any amount should be involved.

"And therefore, there being no notice to the public, and certainly in these cases significant intervention has been made by the public in the past, we will restrict the hearing to those matters that have previously been noticed and that as to what rates you are required in the future to pay for any amounts that might be found will be a matter to be determined in the future rate case.

"And perhaps, since you already have one filed before

us, that it might be a more proper time to discuss those kinds of issues.

"So, if you will proceed on that basis, Mr. Girard.

"MR. GIRARD: Fine, thank you.

"I should have mentioned that when the revised rate schedules were filed, notice was posted, there was not a mailing made or I don't think a newspaper publication made. I wantd [sic] the record to show that, and I am not arguing it was adequate or what is not.

"We will present the case and the only question is, whether we should try and strike from it, if you will, before we ask our questions that material that might be offensive.

"One thing I think, Your Honor, Mr. Chairman, is that the testimony of witness Sloan, who is our rate witness, may be appropriate, and we will have to allow you of course to make the ruling when the time comes, to at least show for illustrative purposes the type of

impact there would be on the ratepayers.

"CHAIRMAN SMYTH: I might express to you that we will be restrictive and we are talking what is required rates of return at this time. That's matter for rate cases, and I am sure by the time we get down to that testimony, we will have had lots of testimony before this commission. I do not want to in any way impair your presentation of this case.

"However, the ground rules are those matters that are germane will be heard, those matters that are not presumably staff will object to them and they will not be heard, and if staff doesn't object to them, if I find they are not material I will certainly advise you, and as you well know I am not bashful in this manner.

"MR. GIRARD: I would stipulate that.

"(Laughter.)

"MR. ROGERS: So will staff."

Again, before presenting the testimony of PP&L's witness Watson:

> "MR. GIRARD: ***
>
> "This case, of course, based on the ruling of the Commission will not involve a contested rate case ***.
>
> * * * * *
>
> "I discussed this part with Staff Counsel because the concern, I'm sure, that Staff has and the Commission has is this isn't a general rate case. ***
>
> * * * * *
>
> "*** It is the Staff's position and has been from the beginning that the issue in this case is whether or not the ratepayer should pay. ***"

The Commission's investigation had for its purpose the determination of whether or not the investment, expenses and obligations incurred by PP&L and LV

in the projects could be considered in connection with rates later to be set for PP&L and LV in Wyoming.

> "(a) The term 'rate,' when used in this act, shall mean and include *** every *** charge or other compensation for service rendered or to be rendered *** and every *** practice, act, requirement or privilege in any way relating to such *** charge or other compensation ***." Section 37-1-102(a), W.S. 1977.

Section 37-2-117, W.S. 1977, supra, fn. 1, authorizes investigation of "any act *** accomplished or proposed, or an investigation of any rate" which the Commission believes should be made "to secure compliance with the provisions of this act and orders of the commission."

The association of PP&L and of LV with the projects are certainly acts and practices "in any way related" to the

charges and compensation for services to be rendered by them. And the Commission could well believe that an investigation was proper to determine if the projects were or could be part of that subsequently to be considered in fixing rates pursuant to § 37-2-122(a), W.S. 1977, infra, fn. 5.

The PSC concluded that the Agreements executed by LV and FR constituted a guarantee of securities as contemplated by § 37-6-101 et seq., W.S. 1977, and that their failure to obtain PSC authorization rendered the Agreements void for rate making and other purposes within the regulatory jurisdiction of the PSC. Further, that the costs incurred by LV, FR and PP&L could not be lawfully passed on to their rate payers, as the

projects were not and would not be "used and useful" for the convenience of the public.

Appellants LV, PP&L, WPPSS and CB all filed petitions for review of the Commission Order, which were ultimately consolidated. The district court affirmed the Commission Order without independent review, whereupon appellants appealed to this court.

Lower Valley, Washington Public Power Supply Service, and Chemical Bank

While all of the litigation below was going on, litigation was also progressing in other states. The decisions reached in the state of Washington are particularly significant to the case before us presently.

The Washington Supreme Court had before it the case of Chemical Bank, a New York corporation v. Washington Public Power Supply System, 99 Wash.2d 772, 666 P.2d 329 (1983). It involved WNP-4 and WNP-5, wherein CB brought a declaratory judgment action against WPPSS and the participants (those who had signed Participants' Agreements, including LV and FR) seeking a determination that the participants owe to WPPSS sufficient funds to pay the bonds, of which CB is trustee, with interest. The Washington Supreme Court held that the defendants who were Washington public utility districts or Washington municipalities lacked authority to enter into said agreement and as to them the agreement

was ultra vires, void ab initio, invalid, ineffective and unenforceable.

Subsequently, and pursuant to mandate from the Washington Supreme Court, the Superior Court of Washington for King County, in its Order and Judgment, held that:

> "2. Inasmuch as the Participants' Agreement is ultra vires, void ab initio, invalid, ineffective and unenforceable as to the defendants which are Washington public utility districts or Washington municipalities, and by reason thereof, the Participants' Agreement is also ineffective and unenforceable as to all other moving defendants and all participant defendants, on the grounds of (a) contract indivisibility and failure of the condition of substantially 100% participation, (b) mutual mistake as to the authority of Washington public utility districts and municipalities to enter into the Agreement, and

(c) frustration of purpose and impracticability."[2]

Further, the Superior Court held that:

> "3. For the aforesaid reasons, none of the moving defendants or any other participant defendant is obligated, under or by virtue of the Participants' Agreement or WPPSS Board of Directors Resolution No. 890, as amended (the 'Bond Resolution'), to make any payment to WPPSS, or to any other defendant, or to Chemical or any purchaser or holder of bonds issued by WPPSS in connection with the Projects."

We agree with the Washington Superior Court that because the Participants' Agreement is void ab initio

---

[2] Chemical Bank v. Washington Public Power Supply System, Case No. 82-2-06840-3, August 11, 1983.

as to 68.275% of the participants,[3] it is also ineffective and unenforceable as to the other participants on the grounds quoted above. Therefore, we hold that the case at bar is moot as regards appellant LV. LV has no debt because of the projects' failure and the issue is not pertinent to any rate case now or hereafter filed by LV.

> "*** [W]hen no judgment rendered can be carried into effect the cause is moot ***." Belondon v. State, Wyo., 379 P.2d 828, 829 (1963).

This being so, we also hold that this case is moot as to WPPSS and CB, as their interests were predicated on

---

[3] Namely, the Washington public utility districts and Washington municipalities.

the validity of the Participants' Agreement.

Pacific Power & Light

The above considerations do not control the disposition of appellant PP&L, as PP&L was not a participant under the Participants' Agreement, but rather a 10% owner of WNP-5, and 29.4% owner of Pebble Springs.

PSC founded its decision, relative to PP&L, on an application of the provisions of § 37-2-119, W.S. 1977, which provides in part:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters

> affecting or influencing such cost or value ***."

Emphasizing the "used and useful" language of this section, PSC found the investment, expenses and obligations incurred by PP&L could not properly be considered in fixing the rate base for PP&L's operation.

If the projects had been successful and had gone on line for production of electricity for public convenience, the cost or value would have been properly considered in establishing a rate base. Since they were not successful and were only partially constructed, they could never become "property" of a "used and useful" nature. Although the project undertakings might conceivably be part of the "business" of

PP&L,[4] we need not determine such inasmuch as the business activity relating to the projects was not current so as to meet the "used and useful" requirement, as the "used and useful" status must be as of the time of rate consideration. Bluefield Waterworks & Improvement Co. v. Public Service Commission of West Virginia, 262 U.S. 679, 43 S.Ct. 675, 67 L.Ed. 1176 (1923); Boston Gas Company v. Department of Public Utilities, 367 Mass. 92, 324 N.E.2d 372 (1975); South Dakota

---

[4] Business is "'the habitual or regular occupation that the party was engaged in with a view to winning a livelihood or some gain,'" In re Lamont, 48 Wyo. 56, 41 P.2d 497, 502 (1935). Business is "'[a]ny occupation connected with the operations and details of trade or industry,'" Zurich Insurance Company v. Friedlander, 261 Md. 612, 276 A.2d 658, 660 (1971).

Public Utilities Commission v. Otter Tail Power Company, S.D., 291 N.W.2d 291 (1980).

Although the investment, expenses and obligations resulting from the projects do not conform to the "used and useful" concept, PP&L contends that they could still qualify for consideration in establishing a rate base if they are a prudent, reasonable and proper expense of operation.[5] Other jurisdictions have dealt with the obligations herein considered as operating expenses

---

[5] Section 37-2-122(a), W.S. 1977, provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment,
>
> (Footnote continued)

and not as property under the "used and useful" principle.[6]

(Footnote 5 continued from previous page)
expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

[6] See Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 21 Ohio Op.3d 96, 423 N.E.2d 820 (1981), dismissed Cleveland Electric Illuminating Company v. Office of Consumer's Counsel, 455 U.S. 914, 102 S.Ct. 1267, 71 L.Ed.2d 455 (1982), where the court quoted the commission order as stating, "'*** [t]hus, we now see the wisdom of the standard emerging from the cases from other jurisdictions; if the expenditures are prudent, amortization should be permitted.'" Id. 67 Ohio St.2d 153, 423 N.E.2d at 825. The court also said: "[t]he core issue *** is whether the commission lawfully and reasonably permitted CEI to treat its investment in the four cancelled nuclear generting stations as amortizable costs." Id. at 825. "There is no question but that the overwhelming weight of authority from other jurisdictions supports the position of the commission." Id. at 826. However,
(Footnote continued)

We cannot accept the investment, expenses, and obligations incurred in construction, or intended construction of property which would normally qualify as "used and useful" for inclusion in a rate base as an operating expense. An operating expense includes:

> "In general, various particular expenses of a public utility are properly chargeable to expense of operation, including any legitimate expense contributing to the better management or greater efficiency of the utility, a reduction of its investment, or an increase in its operating return. ***" 73B C.J.S. Public Utilities, § 36, p. 234.

Unified systems of accounts prescribed by most regulatory agencies usually specify

---

(Footnote 6 continued from previous page) that court disallowed amortization, based on its interpretation of the Ohio statute relating to service-related costs that a utility may recover from its rate payers.

that considered as operating expenses, i.e. taxes, advertising, salaries, commodity purchases and similar items. The PSC recognizes that it cannot ignore the necessary, fair and reasonable expenses of operation incurred by a utility in the rendition of service, and also that there are certain expenses which should be disallowed, such as the following:

> "1. If the questioned outlays represent 'inefficiency' or 'improvidence,' or
>
> "2. Managerial discretion has been abused, or
>
> "3. The action taken has been 'arbitrary' or 'inimical' to the public interest, or
>
> "4. There has been 'economic waste,' or
>
> "5. Such outlays were not legitimate operating expenses

> because they were 'in excess of just and reasonable charges.'"[7]

In contending that the charges were "operating expenses," PP&L argues that a reasonable and prudent test should be allowed. We need not consider this test insofar as it applies to "operating expenses" since these charges were not "operating expenses" as that term is generally considered.

It is probable that PP&L would not contend these expenses to be "operating" ones if the projects were completed.

---

[7] Brief of the Staff of the Wyoming Public Service Commission, before the Public Service Commission of the State of Wyoming, quoting from 1 A. Priest, Principles of Public Utility Regulation, p. 51 (1969).

PP&L would then own a percentage of property; and it would expect to have the cost of the project included in the amount attributed to its "used and useful" property in establishing a rate base.

The argument in this case results from the situation in which PP&L suffers financial loss due to failure of a project intended to become "used and useful" in the service of the public. PP&L wants to include the loss in its financial picture whereby an increase in rates will eventually pay for the loss, i.e., the loss will be borne by the consumers. P&L believes this proper inasmuch as service rendered by an electric power utility is limited by the availability of the supply of the product

it furnishes. The same can be said of some other utilities. A prudent and reasonable attempt to secure or preserve such supply could well be considered a service rendered on behalf of the consumers.[8] When the life of a utility is limited by such supply, amortization of an entire plant investment has been allowed. Pennsylvania Power & Light Company v. Pennsylvania Public Utility Commission, 10 Pa.Cmwlth. 328, 311 A.2d 151 (1973); Clarksburg Light & Heat Co. v. Public Service Commission, 84 W.Va. 638, 100 S.E. 551 (1919); East Ohio Gas

---

[8] It should also be noted that utilities are under a statutory duty to provide service that is adequate and safe. Section 37-3-112, W.S. 1977. This may carry with it the obligation to take some action to insure future supplies.

Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599 (1940). PP&L contends that successful effort in this endeavor would redound to the benefit of the consumers by furnishing a more abundant and cheaper supply of the product and, thus, the failure of the effort should be at the expense of the consumers.

On the other hand, PSC considers the failure of the projects as one of the risks incurred by PP&L when it entered into them. PSC would have the stockholders of PP&L bear the loss since the decision to embark upon the project was made by their representatives who had an opportunity to calculate the risk and to be governed by such calculation. If PP&L gauged the risk with the intention

that the loss would be borne by the consumers, there would be no risk at all for PP&L (the stockholders). This fact might encourage PP&L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail and of great gain should the small chance of success occur.

If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility.

In McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, Wyo., 627 P.2d 173, 179 (1981), we said:

> "As pointed out in Public Service Commission for the State of New York v. Federal Power Commission, D.C. Cir. 1972, 467 F.2d 361, the primary mission of a regulatory body is to protect the consumer, it must 'strive to reach a balance between consumer, producer, and those whose interests fall in between.' The fixing of just and reasonable rates by the PSC involves a balancing of investor and consumer interests, but a fair return to investors is not necessarily fair to consumers. Petition of New England Tel. & Tel. Co., supra [115 Vt. 494] 66 A.2d [135] at 147."

PSC is not in a position to take on any aspect of utility management. It must restrict its position to "regulation" with management decisions being

entirely that of the utility. The difficulty surfaces when it is necessary to distinguish between "regulation" and "management."

Regulation by means of setting rates and determining the factors controlling such by necessity prescribes the "management" domain. Section 37-2-121, W.S. 1977, empowers the commission to act when it determines a rate to be "inadequate or unremunerative, or to be unjust, or unreasonable, or unjustly discriminatory, or unduly preferential" and it may "fix *** such rate as it shall determine to be just and reasonable and in compliance with the provisions of this act." PSC has authority to "prescribe and order" changed "any service or service regulation" as it shall determine "to

be unjustly discriminatory or unduly preferential," or "any service or facility" found "to be inadequate or unsafe," or "any facility or service regulation" found "to be unjust or unreasonable." Section 37-2-122(b), W.S. 1977.

"Regulation" also can be said to limit "management" aspects in connection with certain debt acquisitions by utilities.

> "The right of every gas corporation and of every electrical corporation operating as a public utility in the state of Wyoming to issue, assume or guarantee securities and to create liens on its property situated within the state of Wyoming is a special privilege, hereby subjected to the supervision and control of the public service commission of the state of Wyoming, as hereinafter in this act [§§ 37-6-101 to 37-6-107] set forth. Such public utility when authorized by order of the commission and

not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than eighteen (18) months after the date thereof, for the following purposes: for the acquisition of property; for the construction, completion, extension or improvement of its facilities; for the improvement or maintenance of its service; for the discharge or lawful refunding of its obligations; for the reimbursement of monies actually expended for said purposes from income or from other monies in the treasury not secured by or obtained from the issue, assumption or guarantee of securities, within five (5) years next prior to the filing of an application with the commission for the required authorization; or for any other purpose approved by the commission." Section 37-6-101, W.S. 1977.

Section 37-6-102, W.S. 1977, provides that such securities may be issued only after application therefor is filed with the PSC and after a hearing

from which the Commission does not find that such

> "transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act [§§ 37-6-101 to 37-6-107]; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility."

And § 37-6-106, W.S. 1977, provides that such securities shall be void if "issued, assumed or guaranteed without application to or approval of the commission."

Section 37-3-111, W.S. 1977, provides in part that:

> "Every public utility shall file with the commission copies of contracts, agreements or arrangements to which it may be a party, as the commission may designate. ***"

Section 218 of PSC Rules (1979) requires the filing with it of a copy of all "special contracts which govern the sale by the utility of public utility service or the purchase by the utility of a utility commodity for resale."

It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects. The reference to the statutes and rule is only to exemplify the "management" control by PSC in utility operation. It is a necessary adjunct to "regulation."

Black's Law Dictionary (5th Ed. 1979) defines "regulate" as:

> "To fix, establish, or control; to adjust by rule, method or established mode; to direct by rule or restriction;

to subject to governing principles or laws."

"*** Regulation is an exercise of control while management is an exercise of conduct, in carrying on business. ***" Cloutier v. State Milk Control Board, 92 N.H. 199, 28 A.2d 554, 558 (1942).

"*** 'The word "regulate" is one of broad import. ***'" Blumenthal v. City of Cheyenne, 64 Wyo. 75, 186 P.2d 556, 566 (1947), quoting from City of Owensboro v. Cumberland Telephone & Telegraph Co., 230 U.S. 58, 33 S.Ct. 988, 992, 57 L.Ed. 1389 (1913).

"*** 'The power *** to "regulate" *** implies the right to prescribe and enforce all such proper *** rules and regulations as may be deemed necessary and wholesome in conducting such business in a proper and orderly manner. Ogden City v. Leo, 54 Utah 556, 182 P. 530, 5 A.L.R. 960.'" Jensen v. Town of Afton, 59 Wyo. 500, 143 P.2d 190, 201 (1943).

"*** prohibit[ing] an incident to or a particular

> method in connection with business. *** is merely regulation. *** [R]egulation necessarily implies restriction in some respects and that that means nothing more or less than a partial prohibition. ***" Steffey v. City of Casper, Wyo., 357 P.2d 456, 461 (1960).

The PSC is vitally concerned with fixing of rates. If an effort to obtain a new source of energy supply will affect rates--potentially lowering them if successful and potentially raising them if not successful, PSC has the power to control the effect such project will have on rates. This does not mean that it has the power to dictate whether or not the project should be undertaken or to concern itself with other aspects of the conduct relative to the project. The utility need not consult PSC before embanking on the project. However, if

the utility wishes to involve the consumer in a loss or cost resulting from failure of the project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval is necessary.

In briefs and arguments, the parties make reference to other instances in which PSC has authorized inclusion in the rate base of costs of wells for gas which could turn into dry holes, costs for early retirement of obsolete (for environmental reasons) mechanical flue gas stacks, costs for an abandoned hydro project as a result of federal legislation, etc. Usually the activity which subsequently failed was approved as an activity prior to its inception by the

PSC or it consisted of property with a used and useful history.

Although we cannot attribute a consideration by PSC in determining just and reasonable rates of an investment of questionable return in a potential product producing project to (1) the used and useful property or business of the utility, or (2) to an operating expense of it, we do recognize the authority of the PSC to consider such as a part of the "other values of the *** system, business *** of the public utility," § 37-2-122(a), W.S. 1977 (see fn. 5), if the consideration, and only if the consideration is given before the investment is

made or agreed to be made.[9] The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted--or, perhaps, the proportion of the risk to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. All to be done before the fact of success

---

[9] PP&L's project had a book value as part of its system or business when the investment was made. After it failed, it had no value at all.

or failure is known. As noted, this consideration and resulting decision will affect a "management" aspect within "regulation," but it is a type of regulation necessary and proper for the exercise of the power and duties of the PSC.

In this instance, the PSC was not consulted prior to the investment about it. It was not necessary to do so. But when the investment failed, the onus of the failure must rest on PP&L, the only one which considered the risk and, therefore, the only one accepting it.

Affirmed as to PP&L and dismissed as moot as to the other appellants. LV's rate applications are to be processed without consideration of its involvement in the projects.

ROSE, Justice, specially concurring.

I concur with the result reached by the majority but do not join in that portion of the opinion which would allow the consumers to bear all costs associated with canceled construction projects so long as the Public Service Commission (PSC) had approved the projects prior to investment by the utility. As I interpret Wyoming's statutory scheme pertaining to the regulation of public utilities, the PSC is without authority to accept or veto <u>proposed</u> construction projects for the purpose of shifting their cost to ratepayers. Furthermore, even if the PSC possessed such authority, the ratemaking principles embodied in our statutes do not permit

the recovery of costs associated with construction projects which are terminated before ever providing service to utility customers.

I

This court has consistently held that the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any reasonable doubt as to the existence of any power must be resolved against its exercise. Public Service Commission v. Formal Complaint of WWZ Company, Wyo., 641 P.2d 183 (1982); Phillips Petroleum Company v. Public Service Commission, Wyo., 545 P.2d 1167 (1976); Tri-County Electric Association, Inc. v.

City of Gillette, Wyo., 525 P.2d 3 (1974).

The general powers of the PSC are set out in § 37-2-112, W.S. 1977:

> "The commission shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act."

This statute, as the majority recognize, empowers the PSC to regulate and supervise utilities, not to manage[1] them. Regulation and supervision, however, necessarily entail control over the effects of decisions made by those who manage public utilities.

---

[1] The American Heritage Dictionary defines "manage" to mean: "To direct or administer (the affairs of an organization, estate, household, or business)."

The position advocated by the majority would extend the PSC's sphere of control to cover not only the effects of managerial decisions but the decision-making process itself. In support of their position, the majority cite and discuss a number of provisions in our regulatory scheme as illustrative of the degree of control that the PSC exerts over management as a necessary adjunct to regulation. These statutes, in my judgment, emphasize the supervisory or watchdog function of the PSC in protecting the public interest. Section 37-2-122, W.S. 1977, authorizes the PSC to eliminate existing services, facilities, and regulations which are inadequate, unsafe, unjust, or unreasonable. Section 37-6-101, W.S. 1977, empowers the PSC to

supervise the issuance of securities and the creation of liens, activities which are regulated in competitive as well as monopolistic enterprises in order to protect the public investor. Section 37-6-102, W.S. 1977, mandates PSC approval of proposed securities transactions unless such transactions are inconsistent with the public interest, unlawful, or exceed the assets of the utility. Finally, § 37-3-111, W.S. 1977 and PSC Rule 218 require public utilities to file designated contracts in order to keep the PSC informed.

Clearly, these statutes authorize the PSC, in obeying its charge to guard the public interest, to monitor the business decisions previously made by utility executives. Using these statutes

as a foothold, however, the majority make what I consider to be a monumentally faulty and frighteningly unjustified logic-leap to the conclusion that the PSC has the authority to rule on the viability of proposed utility projects with respect to whether consumers will bear the risk of failure. To deny that such authority would encompass the power to dictate whether a particular project should be undertaken is to deny reality. Utility executives would be compelled to consult the PSC and obtain approval before embarking on any project, or face possible stockholder suits for mismanagement in the event the project fails. The PSC would, in effect, be making crucial decisions concerning utility proposals--all in the name of regulation and, with

all due respect to our Public Service Commission and its able membership, the PSC is not required to be qualified and probably is not qualified to make such delicate and technical public utility management decisions.

The function of the PSC is to protect the consumer through the regulation of public utilities, while taking into consideration the legitimate interests of the utilities. McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, Wyo., 627 P.2d 173 (1981). In carrying out this function, the PSC is empowered to control the effect that new energy projects will have on rates--but only after the utility management has assessed the merits and drawbacks of the proposal and reached a

final decision based on sound business judgment, and only after the project has become used and useful in providing energy. It is not the function of the PSC to provide an insurance policy under which the ratepayers will protect the investments of utility stockholders against all risks. This court recognized as much in McCulloch Gas Transmission Company v. Public Service Commission of Wyoming, supra, 627 P.2d at 179, where we described the regulatory function of the PSC and said:

> "*** The public interest is to be given paramount consideration; desires of a utility are secondary. Big Horn Rural Electric Co. v. Pacific Power & Light Co., Wyo. 1964, 397 P.2d 455. The purpose of the PSC's authority is to protect the public from utilities

affected with a public interest."

Not only is the participation by a state agency in a utility's business decisions unnecessary to regulation, it is impermissible. The United States Supreme Court in State of Missouri ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri, 262 U.S. 276, 289, 43 S.Ct. 544, 547, 67 L.Ed. 981, 985 (1923), said:

> "*** It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in State Public Utilities Commission ex rel. Springfield v. Springfield Gas and Electric Company, 291 Ill. 209, 234 [125 N.E. 891].

> "'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation ***.'" (Emphasis added.)

The proper relationship between regulators and regulated enterprises was described by 1 Priest, Principles of Public Utility Regulation, p. 23:

> "Where inefficiency or improvidence or economic waste or abuse of discretion or action inimical to the public interest have been demonstrated, the agency having jurisdiction may intervene. Business decisions are, however, the prerogative of management. Regulators are not the masters of public utility enterprises. They may, and often should, breathe down the executive's neck, but the basic responsibility is his, not theirs."

The majority opinion would permit utility companies to recover their

investments in terminated construction projects, ineligible for inclusion in rate base or operation expenses, if the proposal is first submitted to the PSC for approval. I conclude that the exercise of such power by the PSC would exceed the scope of the enabling statutes and implicate constitutional proscriptions concerning private property.

II

The majority conclude, and I agree, that Pacific Power & Light Company's capital investment in the now terminated nuclear plants cannot properly be included in the rate base as used and useful property or be amortized as an operating expense. However, the majority would permit the PSC, in determining just and reasonable rates, to consider the

costs associated with such investments under the "other values" language of § 37-2-122(a), W.S. 1977. That statute provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration."

Under this statute, the decisive question is whether "an investment of questionable return in a potential product producing project" (majority opinion 677 P.2d at 808) is one of the "other values of the plant, system, business and properties of the public utility," which may properly be considered for ratemaking purposes. I conclude that it is not, because to allow

the PSC to consider the value of a construction project which ultimately fails is to circumvent the used and useful principle of § 37-2-119, W.S. 1977.[2] I would interpret the physical and other--presumably nonphysical--values specified

---

[2] Section 37-2-119, W.S. 1977, provides as follows:

> "In conducting any investigation pursuant to the provisions of this act the commission may investigate, consider and determine such matters as the cost or value, or both, of the property and business of any public utility, used and useful for the convenience of the public, and all matters affecting or influencing such cost or value, the operating statistics for any public utility both as to revenues and expenses and as to the physical features of operation in such detail as the commission may deem advisable; the earnings, investment and expenditures of any such corpo-
>
> (Footnote continued)

in § 37-2-122(a), supra, as encompassing only the values of those items properly includable in the rate base. That is, § 37-2-122(a) empowers the PSC to consider for ratemaking purposes only the property and business of the public utility which is used and useful in producing the product. I cannot attribute to the legislature the intent to embody in the

---

(Footnote 2 continued from previous page)
ration as a whole within this state, and as to rates in local exchanges or plants of any telephone, telegraph, water, electrical or gas corporations, the geographical location thereof shall be considered as well as the population of the municipality in which such plant or exchange is located."

ratemaking formula both the used and useful principle and the means to annihilate that principle.[3]

---

[3] See Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), where the Ohio Supreme Court refused to interpret a catch-all statute so as to permit the commission to consider the utility's investment in four terminated nuclear power plants as amortizable costs. The court said:

> "*** The commission views [the pertinent statute] as a virtual wild card to be played whenever the commission in its discretion sees fit. We interpret the statute less sweepingly, first because the provisions are linked inextricably with the ratemaking factors contained in [the statute specifying permissible considerations in ratesetting proceedings], and secondly because the General Assembly undoubtedly did not intend to build into its recently revised (1976) ratemaking formula a means by which the commission may effortlessly abrogate that very formula." 423 N.E.2d at 828.

The majority cite several instances in which the PSC has considered for ratemaking purposes the costs of projects not currently useful in supplying the product. Such consideration was permissible, according to the majority, since the terminated activity had received the prior approval of the PSC or had a used and useful history. I would have held that our statutory scheme, including the used and useful principle, contemplates the consideration of the costs attributable to the cited projects, without expanding the meaning of the "other values" language of § 37-2-122(a) and notwithstanding a lack of prior approval by the PSC.

Pursuant to § 37-2-122(a), supra, obsolescence of previously useful

equipment is a proper factor to be considered in setting just and reasonable rates. The cost of drilling a dry gas well is properly categorized as an operating expense, since gas, unlike electricity, is a commodity for which the utility must search in order to provide service. The search for gas necessarily includes the drilling of a certain percentage of dry holes, whereas the production of electricity does not necessarily include the building of a certain percentage of defunct plants. I agree with the pronouncement of the Ohio Supreme Court in East Ohio Gas Co. v. Public Utilities Commission, 137 Ohio St. 225, 28 N.E.2d 599, 609 (1940), concerning the propriety of considering the cost

of gas leaseholds which turn out to be unproductive:

> "It must be apparent that the cost of acquiring, holding for a time during which delay rentals must be paid, testing and finally canceling unproductive acres is the only method by which productive gas acres can be found and developed, and it is equally apparent that this expense must be borne by the consumer who ultimately uses the gas from the productive acres."

It is not necessary to expand our existing statutory scheme in order to justify the recovery of these types of costs through rates.

I conclude that the statutory formula for setting just and reasonable rates does not permit the consideration of utility investments which are not attributable to the rate base and which are not properly designated as costs of

operation. I would adopt the position reiterated by the Ohio Supreme Court when faced with a question of statutory interpretation under circumstances similar to the instant case:

> "*** '*** It is only proper that their [the investors] venture be found operational before they commence to recoup their capital outlays from the consumers.' ***" Office of Consumers' Counsel v. Public Utilities Commission, 67 Ohio St.2d 153, 423 N.E.2d 820, 829 (1981), quoting from Office of Consumers' Counsel v. Public Utilities Commission, 58 Ohio St.2d 449, 456-457, 391 N.E.2d 311 (1979).

THOMAS, Justice, dissenting.

I must dissent in part from the decision reached by the majority of the court in this case. I am in accord that the case must be dismissed as to Lower Valley Power & Light, Inc., Chemical Bank

and Washington Public Power Supply System because it is moot. With respect to Pacific Power & Light Company, however, I would hold that the Public Service Commission had no authority to enter the order which it entered, and I would remand the case with directions that it be dismissed.

The remarkable thing in connection with the disposition of this case by this court is that the majority opinion and the concurring opinion refer to and discuss the correct legal propositions, but they apply them in an erroneous manner. In Justice Rose's special concurring opinion he very ably articulates the proposition that the Public Service Commission has only that power and authority granted to it by the Wyoming

Constitution and statutes, and that the statutory powers must be strictly construed. There is no need to again cite the authorities which encompass those holdings. At page 808 of the majority slip opinion the court aptly says:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects."

The document which initiated Pacific Power & Light Company's involvement in this proceeding was a notice and order setting hearing which was entered on April 22, 1982, and that document did not reflect the justification for the investigation by the Public Service Commission. It is clear, however, that

the commission did proceed pursuant to § 37-2-117, W.S. 1977, which provides:

> "Whenever the commission shall believe that an investigation of any act or omission to act, accomplished or proposed, or an investigation of any rate, service, facility or service regulation of any public utility should be made in order to secure compliance with the provisions of this act and orders of the commission, it may of its own motion summarily investigate the same." (Emphasis added.)

While I might rely simply upon the concession in the majority opinion to the effect that no investigation was needed to secure compliance with the provisions of the act or the orders of the commission, I will point out that this record and the arguments of counsel for the commission are devoid of any reference to any statute or order of the

commission with which compliance by Pacific Power & Light Company needed to be secured. I am prepared to concede that the commission might investigate in order to determine if such a situation existed, but once it determined that there was no justification for the investigation I cannot perceive any authority which would permit the Public Service Commission to enter the order that it did in this instance.

I recognize that it is popular to ride on the judicial steam roller which has flattened Washington Public Power Supply System. While I might be in sympathy with the result which the Public Service Commission and this court reaches, I find I have no empathy for what I believe to be an abuse of the

commission's authority which this court has sustained.

I understand that the Public Service Commission has told Pacific Power & Light Company that if Pacific Power & Light Company should wish to include its investment costs in these abandoned nuclear power plants in any future rate to be applied to Wyoming consumers that the Public Service Commission of Wyoming will not permit that. Purely and simply that is an advisory order from the Public Service Commission, and our statutory scheme does not justify such an approach. This court has said that it does not render advisory opinions, and we dismiss cases in which an advisory opinion is sought. Aetna Casualty and Surety Company v. Langdon, Wyo., 624 P.2d 240

(1981); Kwallek v. State, Wyo., 596 P.2d 1372 (1979); Police Protective Association of Casper v. City of Casper, Wyo., 575 P.2d 1146 (1978); State v. Rosachi, Wyo., 549 P.2d 318 (1976); Knudson v. Hilzer, Wyo., 551 P.2d 680 (1976); and Tobin v. Pursel, Wyo., 539 P.2d 361 (1975). In part the fact that this court does eschew advisory opinions is premised upon the proposition that there is no way in which the judgment which is rendered may be carried into effect. Perhaps the result is to make the case moot as discussed on page 802 of the majority slip opinion. The point, however, is that the Public Service Commission, without statutory authority, does not have any business entering an order such as this; and yet, by affirming what the Public Service

Commission has done, this court has, in effect, and contrary to a longstanding jurisprudential discipline, joined in an advisory opinion. No matter how much the parties want an answer to this question we should not so casually abandon that rule of jurisprudence.

As indicated, I would reverse the order of the Public Service Commission because this court has the duty to hold unlawful and set aside agency action which is in excess of statutory authority. Section 16-3-114(c)(ii), W.S. 1977 (Oct. 1982 Rev.).

IN THE SUPREME COURT, STATE OF WYOMING

OCTOBER TERM, A.D. 1983

PACIFIC POWER & LIGHT COMPANY, a corporation,	)	
Appellant (Petitioner),	)	
v.	)	No. 83-75
THE PUBLIC SERVICE COMMISSION OF WYOMING,	)	
Appellee (Respondent).	)	

ORDER DENYING REHEARING

Pacific Power & Light Company having made application for rehearing in this matter, and the court being fully advised, it is

ORDERED that Pacific Power & Light Company's Application for

Rehearing be, and the same hereby is, denied.

Dated March 8, 1984.

By the Court

ss/John J. Rooney
John J. Rooney
Chief Justice

BEFORE THE PUBLIC SERVICE COMMISSION

OF WYOMING

IN THE MATTER OF THE INVESTIGATION OF LOWER VALLEY POWER AND LIGHT, INC.	)	DOCKET NO. 9617 SUB 11
IN THE MATTER OF THE INVESTIGATION OF FALL RIVER RURAL ELECTRIC COOPERATIVE, INC.	)	DOCKET NO. 9628 SUB 6
IN THE MATTER OF THE INVESTIGATION OF PACIFIC POWER & LIGHT COMPANY	)	DOCKET NO. 9454 SUB 17

MEMORANDUM OPINION AND FINAL ORDER

The Commission initiated this investigation of the participation by Wyoming jurisdictional public utilities in the Washington Public Power Supply System (WPPSS) nuclear generation plant construction projects known as WNP 4 and 5.

The Commission having considered the evidence adduced at public hearings and being advised in the premises, FINDS and CONCLUDES that:

FINDINGS AND CONCLUSIONS CONCERNING JURISDICTION AND PROCEDURE FINDINGS OF FACT

1. Lower Valley Power and Light, Inc. (Lower Valley) is a distribution level electric cooperative providing service in Afton, Jackson and the surrounding communities and areas in Lincoln and Teton counties in Wyoming. Fall River Rural Electric Cooperative, Inc. (Fall River) is also a distribution level electric cooperative serving approximately 114 Wyoming consumers and approximately 6600 consumers in Idaho and Montana. Pacific Power & Light Company

(Pacific Power) is a publicly held corporation providing electric service as a regulated public utility in Wyoming, Idaho, Montana, Oregon, Washington and California. Communities served by Pacific Power in Wyoming include Casper, Laramie, Lander, Rawlins, Riverton, Worland, and Rock Springs. Pacific Power also wholesales electric power to Wyoming utilities (e.g., Cheyenne Light, Fuel & Power Co.) and municipalities which have their own distribution systems (e.g. Basin and Powell).

The Independent Staff of the Commission acted separate and apart from the Commission in investigating and examining these matters from a consumer interest viewpoint. The Independent Staff was permitted to intervene and

participate as a party pursuant to W.S. 9-4-111 and 9-4-112(c) of the Wyoming Administrative Procedure Act and Commission Rule Section 103(c). The assigned Independent Staff had no contact with the Commission except in the public proceedings in this matter.

2. On November 4, 1981, the Independent Staff of the Public Service Commission brought a Petition in Docket No. 9617 Sub 11 for authority to conduct an investigation concerning the participation by Lower Valley Power and Light Company in the Washington Public Power Supply System's construction of Units 1 through 5. On November 13, 1981, an Order was entered granting the Petition. On November 19, 1981, Lower Valley filed its Petition which also requested

that the Commission Staff investigate Lower Valley's involvement with the WPPSS projects. On the 10th day of December, 1981, the Commission again reaffirmed its prior Order requiring an investigation of the matter. Subsequently, on April 19, 1982, the Commission entered its Notice and Order Setting Hearing in this docket. Hearing was set for June 16, 1982 in Cheyenne, Wyoming.

Three days after the Commission set the matter for hearing concerning Lower Valley's participation in these projects, the Commission entered another Notice and Order Setting Hearing which required a consolidated hearing for Lower Valley in Docket No. 9617 Sub 11, Fall River Rural Electric Cooperative, Inc. in Docket No. 9628 Sub 6, and Pacific Power

and Light Company in Docket No. 9454 Sub 17. The consolidated investigation was for the purpose of considering the participation by these three electric utilities in the WPPSS nuclear power projects. The consolidated hearings were to commence on June 16, 1982 in Cheyenne, Wyoming.

3. On May 26, 1982, the Independent Staff filed its Motion for Continuance which was unopposed, and on May 28, 1982 the Commission granted that Motion. Those persons seeking to intervene were required by the Commission's Order to present their petitions to intervene before July 2, 1982, and hearings were scheduled to commence on July 12, 1982 in Cheyenne, Wyoming.

4. Publication of the change of hearing date and the Commission's Order was accomplished by publishing the Order in the newspapers of general circulation in the communities of Casper, Laramie, Lander, Rawlins, Riverton, Worland, Rock Springs, Jackson and Afton. No party intervened within the time period required by the Commission's Order. However, on September 1, 1982 the Commission received a Petition to Intervene by FMC Corporation which was denied by the Commission since hearings had already been had.

5. Hearings were conducted from July 12th through the 16th, 1982 in Cheyenne, Wyoming. Protest statements were received in conjunction with another hearing held in Afton on July 20, 1982

and in Jackson on July 22, 1982 in Docket 9617 Sub 12. Briefs were filed by the Companies and the Independent Staff on September 3, 1982.

6. During the hearings Pacific Power presented evidence without objection concerning its participation in another nuclear power project known as Pebble Springs. Pebble Springs is not in any way connected with the WPPSS projects. Neither the Commission nor any participant made note of the fact that the investigation of Pebble Springs was not noticed to the public or required to be investigated by the Commission's Notice and Order Setting Hearing. While the Commission realizes that such a procedural defect should cause us to reset the inquiry into Pebble Springs for

hearing after public notice, we believe that the public interest will not be served by withholding a decision relating to Pebble Springs and that no harm will be done. We come to this conclusion after considering the following: a) the facts upon which we rely in making our decision are straight forward and there can be no dispute over these facts; b) the principles upon which we base our decision are as applicable to Pebble Springs as they are to the WPPSS projects; c) the parties in their presentation, briefs, and arguments, carefully and fully developed the law, and competing theories and arguments for our considerations; and d) our decision will not cause rates to increase. The

Commission therefore finds that the public interest will not be served by withholding a decision in this matter.

7. Lower Valley Power and Light Company, Fall River Rural Electric Cooperative, Inc., and Pacific Power and Light Company are public utilities within the jurisdiction of the Commission.

8. The Commission has the power to investigate and determine whether costs associated with capital expenditures in abandoned or cancelled power projects shall be passed on to ratepayers in the form of increased rates. See W. S. 37-2-112, 37-2-116, 37-2-119, 37-2-127.

FINDINGS ON WPPSS POWER PROJECTS

9. The Washington Public Power Supply System is a Joint Operating Agency organized in 1957 under Washington law

for the purpose of building, owning and operating electric generation and transmission facilities and for the purpose of selling electric power to its members and others from those facilities. Tr. Vol. IV p. 904. WPPSS is composed of 23 members consisting of four Washington cities and 19 Washington public utility districts. Tr. Vol. III p. 676. Between 1970 and 1975 WPPSS decided to undertake the construction of five nuclear power plants known as WNP 1 through 5. Tr. Vol. III pgs. 676-679.

WNP 1, 2, and 3 were financed by WPPSS through an arrangement with the Bonneville Power Administration known as the "net billing agreement." Under this agreement WPPSS would construct plants and would provide to BPA the output of

the plants at cost in return for an equal credit on power bills they received from BPA. This resulted in BPA averaging the higher cost nuclear power with the lower priced hydro power, and with the BPA indirectly backing the plant construction, the result was the highest possible ratings for the project's bond issues. Tr. Vol. IV p. 906-7.

WNP 4 and 5 were financed differently because BPA could not provide the backing for these additional units through the net billing agreement. WPPSS enlisted 88 electric utility cooperatives and public utility districts in its efforts to gather the financial backing needed for these additional projects. Among the 88 participants were Lower Valley with a 0/837% participant's share in

WNP 4 and 5, and Fall River with a 0.648% participant's share in these two units. In addition, Pacific Power was a 10% owner of WNP 5. Tr. Vol. IV p. 907, 956; Vol. IV p. 451. While Pacific Power financed its 10% ownership share of WNP 5, WPPSS financed its ownership of WNP 4 and its 90% ownership of WNP 5 through the sale of municipal tax-exempt bonds. In turn the 88 participants each signed a Participant's Agreement which entitled them to a percentage share of WPPSS power from units 4 and 5 at cost, and obligated each utility to pay this same proportion of total WPPSS costs "whether or not" the projects were completed. Tr. Vol. IV p. 956; Fall River Exhibit 10 Tr. Vol. I p. 98; Lower Valley Exhibit 15. These Participants' Agreements were executed on

July 14, 1976 by Lower Valley and Fall River. Pacific Power also entered into its ownership agreement with WPPSS on WNP 5 on July 14, 1976. LV Exhibit 15; FR Exhibit 10; Tr. Vol. IV p. 678.

FINDINGS CONCERNING GUARANTEE OF WPPSS BONDS

10. The provisions of the Participant's Agreements that both Lower Valley and Fall River executed are identical (FR Exhibit No. 10 and LV Exhibit No. 15). Section 4 of the Participant's Agreement requires WPPSS to issue and sell bonds to finance the cost of construction of the projects, and to pay or provide for the payment of the principal, interest, and premium on the outstanding bonds. In Section 5 of the Participant's Agreement,

Lower Valley and Fall River agree to purchase a share of the project's capability. The purchase price to be paid by Lower Valley and Fall River each year for its Participant's share is the amount specified in the billing statement provides by WPPSS.

11. Section 6(d) of the Participant's Agreement provides:

> "The participant shall make the payments to be made to supply system under this agreement whether or not any of the projects are completed, operable or operating and notwithstanding the suspension, interruption, interference, reduction or curtailment of the output of either project for any reason whatsoever in whole or in part. Such payments shall not be subject to any reduction, whether by offset or otherwise, and shall be conditioned upon the performance or nonperformance by supply system or any other participant or entity under this or any other agreement or instrument, the

remedy for any performance being limited to mandamus, specific performance or other legal or equitable remedy."

Because participants agreed to make payments to WPPSS regardless of whether the projects were ever completed; and because the payments that Lower Valley and Fall River must make to WPPSS for WNP 4/5, aside from termination costs, are directly tied to the principal and interest payments on WPPSS bonds, the Participant's Agreement Section 6(d) is for all intents and purposes a guarantee of the WPPSS bonds which financed the projects.

12. The Participant's Agreements executed by Lower Valley and Fall River were not submitted to the Public Service Commission for its review or approval at

the time of their execution or at any subsequent time prior to these proceedings. Tr. Vol. I p. 107, 203; Vol. IV p. 908.

13. Wyoming Statute 37-6-101 provides in pertinent part that

> "a public utility when authorized by order of the Commission and not otherwise, may issue stocks and stock certificates and may issue, assume or guarantee other securities payable at periods of more than 18 months after the date thereof for the purposes of acquisition of property, or the construction of facilities..."

The WPPSS bonds that were issued are payable at periods more than 18 months after issuance and were for the purpose of acquisition of property and the construction of facilities.

Wyoming Statute 37-6-106 provides that "all securities issued, assumed or guaranteed without application to or approval of the Commission...shall be void."

CONCLUSIONS OF FACT AND LAW ON GUARANTEE OF WPPSS BONDS

14. The Participant's Agreements entered into by Fall River and Lower Valley with the Washington Public Power Supply System constitute a guarantee of securities as contemplated by Wyoming Statute 37-6-101 and Wyoming Statute 37-6-106.

15. Fall River and Lower Valley did not comply with Wyoming Statute 37-6-101 and 37-6-106 by failing to apply for or obtain the Commission's authorization to

issue the guarantee contained in the Participant's Agreements.

16. The failure of Fall River and Lower Valley to obtain the Commission's authorization to guarantee the WPPSS securities renders the Participant's Agreement void for rate making and other purposes within the regulatory jurisdiction of the Commission. W.S. 37-6-106.

17. Because the Participant's Agreement is void for ratemaking and other purposes within the regulatory jurisdiction of the Commission, the costs incurred by these public utilities because of the guarantee in the Participants' Agreements cannot and should not be lawfully passed on to Fall River or Lower Valley ratepayers.

FINDINGS CONCERNING WPPSS TERMINATION

18. Construction of WNP 4 and 5 was terminated by WPPSS in January 1982. WNP 4 was approximately 20% complete and WNP 5 was approximately 16% complete when terminated. Tr. Vol. III p. 709; Tr. Vol. IV p. 914. These projects are being terminated through contractor settlements and negotiations to avoid lawsuits and ensure that the termination of these projects proceeds with some degree of efficiency. This has been termed 'controlled termination.' Tr. Vol. IV p. 913. Termination costs estimated for WNP 4 and 5 during 1982 are $94,639,000. For 1983-84 final termination and settlement costs are estimated to be an additional $120,360,000. Tr. Vol. IV p. 955; Staff Exhibit 3. Lower Valley and Fall River

voluntarily advanced 'loans' to WPPSS to assist in WPPSS cash flow for this controlled termination. Lower Valley 'loaned' WPPSS $305,618, and Fall River 'loaned' WPPSS $236,710; amounts which the utilities claim will be credited back at a later date against monies owed to WPPSS. Tr. Vol. I pgs. 425-428; Vol. IV p. 957.

19. The payments that Lower Valley and Fall River must make to WPPSS for WNP 4/5, aside from termination costs, are directly tied to the principal and interest payments on WPPSS bonds which financed the projects. The principal and interest payments, together with the prorata share of anticipated termination costs for Lower Valley and Fall River, will continue under the Participant's

Agreement through the year 2018 A.D. In total Lower Valley would ultimately pay approximately $62,250,000 and Fall River would ultimately pay WPPSS approximately $48,193,000. Tr. Vol. IV p. 956; Staff Exhibit 4. Placed in the perspective of all WPPSS costs for WNP 4/5, even these large amounts of money seem small. As previously noted WPPSS termination costs through 1984 are anticipated to be $214,999,000. Bond principal payments from 1989 to 2018 will amount to $2,250,000,000. Interest payments from 1982 to 2018 will amount to $4,972,282,000. Incredibly enough, the total bill for WNP 4/5 comes to $7,437,281,000. Tr. Vol. IV pgs. 955-960; Staff Exhibits 3 and 4. These are not estimates of what it would cost to

complete the projects, but actual costs associated with these two WPPSS projects which were only 16 to 20 percent complete when terminated. The estimated cost of completing WNP 5 alone was over $6 billion in December 1981. Tr. Vol. III p. 718.

20. Pacific Power financed its own participation in WNP 5. Through December 31, 1981, Pacific Power had an actual before tax investment of $99,092,000 in WNP 5. Tr. Vol. III p. 719; Pacific Exhibit 7, Table 7-1.

21. It is clear that no electric power has been generated or can be expected to be generated by these cancelled power plant projects. We cannot find any present or future benefit that will flow from the massive investment in

these projects to the consumers of Pacific Power, Lower Valley or Fall River.

THE USED AND USEFUL PRINCIPLE

The used and useful principle provides that only that utility plant which is currently used and useful in rendering utility service to the public shall be included in computing rate base and expenses recoverable in rates from the public.

W.S. 37-2-119 requires that the Commission consider "the property and business of any public utility, used and useful for the convenience of the public..." We understand this to mean that by law the Commission must focus on the assets used and useful in rendering service to the public, rather than the

capital invested in utility assets. We have concluded that in any case the principle ought to be applied by focusing on the assets involved in rendering service to the public. Otherwise utility consumers might find themselves supporting non-utility investments as well as utility investments - clearly a result which the law was enacted to avoid.

We reject the notion that the thing which is truly used and useful to consumers is the capital investment in the form of funds which require a return and not the capital assets which are used to provide the utility service. Union Electric Co., Docket No. U-558 (Iowa Commerce Commission (1975)). While it is true that a utility plant does cost money and that money is provided by investors,

it is the utility plant and not the money which generates electricity. By focusing on the capital rather than the asset side of the balance sheet, we would make an unfounded assumption that the assets purchased by the capital are used and useful, or we would be compelled to assume that investor owned public utilities are not subject to the same risks of loss that exist in the competitive arena. We will not make either of these assumptions.

Since no Commission should assume that all capital invested was for plant used and useful in rendering service to the public, testing such an assumption would always lead back to the asset or left-hand side of the balance sheet anyway. We prefer not to make such

an assumption and we find that the simplest, most direct way to apply the used and useful concept is to focus on the asset side of the balance sheet in the first instance. Policy and the law require focusing on utility facilities.

It appears, however, that a more fundamental reason we are asked to focus on the right-hand side of the balance sheet (a method known as the invested-capital or prudent-investment rate base) may be to allow a means of accommodating the assumption that investor owned public utilities should only bear the risk of loss from imprudent or fraudulent capital investments. For reasons which will be set out below we reject this assumption also. Our focus

then is upon the asset side of the balance sheet because this is the simplest, most direct and logical method for identifying those assets which are used and useful in rendering service to the public. If logic did not dictate that we focus on the assets in applying the principle then we believe W.S. 37-2-119 would require such a focus in the public interest.

The second element of the concept revolves around the requirement that the plant or property be 'used and useful for the convenience of the public.' We understand these words to refer to those capital assets which directly or indirectly are actually and currently used in providing utility service to the public.

In summary, the concept is best expressed by the question: "Are particular items of property used and useful in rendering service to the public?" The emphasis in the application of the concept is upon the identification and valuation of property and assets, and upon the determination whether those assets are currently used and useful in rendering service to the public. We believe our understanding of this basic public utility principle is one to which the parties to these proceedings subscribe. Tr. Vol. III p. 572-573.

CONSEQUENCES OF APPLYING THE USED AND USEFUL PRINCIPLE

22. If utility plant is used and useful in rendering service to the public then that plant will be included in rate

base and the utility will be allowed to earn a rate of return on that investment. Plant included in rate base is allowed to be depreciated or expensed over a period of years. Maintenance and other expenses related to capital plant are expensed as they occur. Conversely, if utility plant is not used and useful in rendering service to the public then application of the used and useful principle has the following consequences for rate making purposes:

1. Exclusion of the investment from rate base upon which rate of return is computed;

2. Denial of an amortized recovery of the investment; and

3. Denial of recovery of termination, maintenance, and other expenses related to the property in question.

Investors do not only risk an opportunity to earn a return on investment, but also any return of the investment itself and of those expenses related to the capital investment.

REASONS FOR APPLYING THE USED AND USEFUL PRINCIPLE

23. There are a number of reasons for applying this principle. First we believe the legislature has required its application. W.S. 37-2-119 provides that in conducting any investigation the Commission "may investigate, consider and determine such matters as the cost or

value, or both, of the property and business of any public utility, used and useful for the convenience of the public ***." The issue is raised whether the application of the "used and useful" principle is mandated by this statute or whether the use of the word "may" indicates that application of the principle is a matter of discretion with the Commission. We believe that the discretion given to the Commission by the Legislature is with respect to whether the Commission will use a cost or a fair value method or both for the valuation of rate base, and not whether the Commission will apply the used and useful principle.

While the Commission believes that the Legislature has mandated

application of the used and useful principle, we do not apply that principle here solely because of this reading and understanding of W.S. 37-2-119. We also apply this principle to the abandoned construction projects in question because we believe it is appropriate in the public interest. If we have discretion to apply the used and useful principle we exercise that discretion by applying the principle because the consuming public has not and will not receive any electrical service from these cancelled power projects. Regulation in the public interest requires that rates reflect only those costs and expenses related to facilities which serve the public. Tr. Vol. IV p. 962-966. The risk of loss from a failed investment falls upon the

investor, not the consumers of these utilities, and the risk taking by investor utilities does not shift because of a showing of management prudence. Losses may occur when management is prudent as well as when management is imprudent. We do not accept the proposition that because a public utility has a service obligation and its rates are regulated, it takes on a quasi-governmental role and immunizes itself from a risk of loss which investors in non-regulated companies incur.

The risk of loss to public utility investors is not lessened by the fact that a public utility incurs a service obligation. The service obligation merely recognizes the fact that an electric public utility, for all intents and

purposes, has a monopoly within a service area and it provides an essential modern service. The grant of a certificate of public convenience for a service area carries with it the obligation that service will be provided to those in the area which require it. The service obligation flows from the monopoly position the utility enjoys in providing an essential service to the public.

Regulation of rates also flows from the fact that public utilities operate more efficiently as monopolies, and the public interest thus requires both the most efficient method of providing essential services and protection from monopoly abuse. It does not follow that because utilities have a public service obligation and their rates are regulated,

public utility investors only incur the risk of capital investment loss when management is imprudent or engages in fraudulent activities.

24. We conclude that under the circumstances the application of the used and useful principle will result in the setting of just and reasonable rates because ratepayers should not be required to pay for facilities and related expenses which will not directly or indirectly provide electric service.

25. Pacific Power & Light is a publicly held corporation which is traded on the New York Stock Exchange. Lower Valley and Fall River are distribution level electric cooperatives whose membership is composed of its ratepayers. Despite the

differences between a publicly held corporation and a cooperative, the burden of risk bearing in these enterprises remains upon the investor, whether that investor is a stockholder or a cooperative member/ratepayer. Given the fact that electricity is an essential modern service it should also be observed that cooperative membership in Lower Valley or Fall River is not a purely voluntary matter as it is with Pacific Power & Light's stock and bond holders. Nevertheless a cooperative member's capital credits are at risk here.

26. In examining the reasons why we should exercise any discretion we may have in applying this principle, we have not relied solely upon the record. Whether or not as a matter of fact a

capital investment is used and useful is a matter which must be supported by the record. However, our understanding of the meaning and reasons why certain established utility principles exist, such as the used and useful principle, is not wholly dependent for its application upon an explanatory recitation in the record by one or more of the parties. The Commission believes it can, should, and sometimes must be able to draw upon its more than 22 years of collective experience, expertise, and regulatory judgment in defining and applying certain general and long established utility principles.

SUMMARY OF FINDINGS ON WPPSS PROJECTS

27. It is clear that no electric power has been generated or can presently be expected to be generated by WNP 4 and 5. The investment by WPPSS and Pacific in these projects is not and cannot be expected to be used and useful for the convenience of the public. We believe that each of these three public utilities must agree that this is the case. Tr. Vol. I p. 132; Tr. Vol. I p. 193, lines 2-5; Tr. Vol. III p. 572-579. We therefore conclude that Pacific's investment in WNP 5 should not be included in rate base for rate of return purposes, should not be recovered in rates through any period of investment amortization; and no termination costs or other costs associated with the WNP 5 should be included

in utility expenses recoverable from its Wyoming ratepayers.

28. We also conclude that Lower Valley and Fall River should not be permitted to recover in rates any payments due to WPPSS under the Participant's Agreement because any such payments would be for facilities which are not and will not be used and useful for the convenience of the public. The application of the used and useful principle of public utility ratemaking is not dependent upon the particular form of financial agreement to which the utility has committed itself. If this were the case the legislature's intent to have the used and useful principle applied would be easily circumvented. For ratemaking

purposes we are concerned with one essential question in this case. Is the facility for which the utility has guaranteed payment of a pro rata share of costs used and useful for the convenience of the public? The answer in this case is no. Therefore, application of the principle properly precludes the recovery from ratepayers of expenditures related to these cancelled power projects.

We recognize that there is a difference between Pacific Power which entered into an Ownership Agreement with WPPSS, and Lower Valley and Fall River which entered into a Participant's Agreement with WPPSS. Had WNP 5 become operational we would have allowed Pacific Power's ten percent ownership interest to

be included in rate base, and depreciation and other expenses would have been allowed. Under the Participant's Agreement WPPSS remained the owner and the participants would have expensed the cost of electricity purchased from WPPSS. This cost, however, would have included an amortization of the investment, interest payments on WPPSS bonds, and all operations and maintenance expenses. Since WNP 4/5 were not completed, however, Lower Valley and Fall River are obligated to WPPSS under the Participant's Agreement to make payments for termination expenses, and bond principal and interest payments. Their financial obligation is no different under the Participant's Agreement than it

would have been under an ownership agreement. While we recognize that there is a distinction between the financial arrangement entered into by Lower Valley and Fall River and that entered into by Pacific Power, we believe that for purposes of applying the used and useful principle it is a distinction without a difference. The intent of the legislature to have the principle applied, and our belief that it should be applied, ought not be affected by the form of the financing agreement when the ultimate financial obligation is the same. Rural Electric Co. v. State Board of Equalization, 120 P.2d 741, reh. den. 122 P.2d 189 (Wyo. 1942); Tri-County Electric Association v. City of Gillette, 584 P.2d 995 (Wyo. 1978).

FINDINGS ON PEBBLE SPRINGS

29. Pebble Springs was to be a two-unit nuclear generating station with a net electrical rating for each unit of 1260 megawatts. It was to be located in Gilliam County, Oregon, approximately four miles southeast of Arlington. Ownership was divided among Portland General Electric Company (PGE), Puget Sound Power and Light Company, and Pacific, in 47.1 percent, 23.5 percent and 29.4 percent shares respectively. Tr. Vol. II p. 450. In October 1974 Pacific agreed to participate in the Pebble Springs project. Seven and one-half years later in April 1982, PGE announced the termination of the project by withdrawing its site certificate application. Tr. Vol. III p. 673. The estimated cost of

completion of Pebble Springs had risen from $650 million in May 1973 to more than $5 billion at the time of hearing in July 1982. Tr. Vol. III p. 673-675. Although more than $200 million was invested in this project no actual construction other than site preparation ever commenced. Tr. Vol. III p. 531. No electric power has been generated or can presently be expected to be generated by this cancelled power plant project. The investment by Pacific and its partners in the Pebble Springs project is not used and useful for the convenience of the public. We believe that Pacific must agree that this is the case. Tr. Vol. III p. 572-579. Our prior discussion of the reasons for applying the used and

useful principle is incorporated by reference here. In summary, the legislative mandate of W.S. 37-2-119 requires, and the unanimous judgment of the Commission compels the application of the used and useful principle in establishing just and reasonable rates under these circumstances. We therefore conclude that Pacific's investment in this cancelled power project should not be included in rate base for rate of return purposes, and should not be recovered in rates through any period of investment amortization. Neither should any termination costs or other costs associated with the project be included in utility expenses recoverable from Pacific's Wyoming ratepayers.

OTHER FINDINGS

30. The utilities contend that if they were prudent they should be permitted to recover from ratepayers their investment and related financial obligations. We have indicated why we believe that application of the used and useful principle is required and appropriate. Application of this principle makes it unnecessary to decide whether or not these utilities were prudent in their decision making, participation, and management of these cancelled power plant projects.

31. To the extent any that prior decisions of the Commission are in conflict with this decision, this decision should be considered controlling and definitive. Never before have we been

asked to thoroughly explore the meaning and application of the used and useful principle in such depth. In this case we have not been asked to consider the application of the principle to power plants or capital facilities which have been operational but are abandoned or superceded before being fully depreciated. That is a different factual situation which might require a different result, as was the case in Docket 9454 Sub 11 when we allowed Pacific Power to recover the unamortized balance of its extraordinary property losses from the early retirement of the Dave Johnson Plant mechanical flue gas stacks. The premature retirement in that case was required by changes in Wyoming's

environmental air quality standards which forced replacement of the stacks.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Pacific Power & Light Company is hereby denied, now and in the future, the opportunity to recover in rates from its Wyoming jurisdictional consumers its investment and expenses related to the cancelled and abandoned power plant projects known as WNP 5 and Pebble Springs. These investments shall be excluded from the computation of rate base in any future rate proceeding before this Commission.

2. Lower Valley Power & Light Company and Fall River Rural Electric Company are hereby denied, now and in the future, the opportunity to recover in

rates from their Wyoming jurisdictional consumers any expenses related to their obligations under the Participant's Agreement with the Washington Public Power Supply System for the cancelled and abandoned power plant projects known as WNP 4 and WNP 5.

3. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming this 2nd day of December, 1982.

PUBLIC SERVICE COMMISSION OF WYOMING

JOHN R. SMYTH

John R. Smyth, Chairman

G. KEITH OSBORN

G. Keith Osborn, Commissioner

C. E. JOHNSON

C. E. Johnson, Commissioner

(SEAL)

ATTEST:

ALEX J. ELIOPULOS

ALEX J. ELIOPULOS, Secretary

IN THE CIRCUIT COURT OF COLE COUNTY
MISSOURI

STATE OF MISSOURI, ex rel. UNION ELECTRIC COMPANY, A Missouri corporation, Relator,	)	
vs.	)	
PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI, Respondent,	)	
and	)	Case No. CV 183-1064cc Division No. II
PUBLIC COUNSEL FOR THE STATE OF MISSOURI	)	
and	)	
MISSOURI PUBLIC INTEREST RESEARCH GROUP, Intervenor-Respondents.	)	

ORDER

This case has been submitted to the Court on transcript and exhibits before the Missouri Public Service Commission ("Commission"), in Commission Case No. ER-83-163.

The parties hereto have filed with the Court briefs and suggested findings of fact and conclusions of law, and the arguments of counsel having been heard, now therefore, on the 16th day of April 1984, the Court having considered this matter and being fully advised in the premises, finds and determines as follows:

FINDINGS OF FACT

On December 3, 1982, Union Electric Company ("Company") filed revised tariffs with the Commission for an annual increase in electric rates of approximately $122,000,000. Before the effective date of the new rates, the Commission duly suspended the proposed tariffs and set the matter for formal hearings. Various groups were parties to

the proceedings before the Commission including the Missouri Public Interest Research Group ("MoPirg") and the Office of the Public Counsel ("Public Counsel").

A Stipulation and Agreement was approved by the Commission on July 6, 1983, providing for an increase in gross annual revenues of $30,500,000. The Stipulation and Agreement provided in part that it was intentionally silent as to rate of return and that the issue of the recovery of the costs associated with the cancelled Callaway II nuclear facility was not resolved but was left to be resolved after hearing by the Commission.

Hearings on the issue of the recovery of the costs associated with the cancelled Callaway II nuclear facility were held in Jefferson City beginning

August 24 and concluding on August 29, 1983. The Company and the Commission Staff submitted testimony and exhibits and were subject to cross examination by all parties.

Union Electric is an electrical corporation doing business as a public utility within the State of Missouri. Union Electric cancelled the Callaway II nuclear plant in October of 1981. There is no dispute among the parties to this review that the Callaway II nuclear facility has not provided, is not now providing, and will never provide electrical service to Union Electric's Missouri customers.

In its Report and Order dated October 21, 1983, the Commission ruled

that Section 393.135, RSMo 1978 (Proposition 1) barred the recovery through the rates to be charged by Union Electric of the costs associated with the construction of the Callaway II nuclear facility. The Commission did not reach the issues of whether under the facts of the case, recovery of the Callaway II costs was desirable and reasonable under general ratemaking principles, the amount of cancellation costs attributable to Callaway II, the amortization period, if any, or proposed adjustments with respect to APUDC settlements and deferred taxes. Thereafter, Relator timely filed an Application for Rehearing with the Commission, alleging that the Commission

erred in denying the costs. The Application for Rehearing was denied by the Commission.

The only issues presented to this Court are whether Union Electric is prohibited from recovering the costs associated with the construction of the Callaway II nuclear facility by Section 393.135, RSMo 1978, and, if so, whether the operation of that statute denying recovery is permitted under the United States and the Missouri constitutions and whether the Commission properly excluded Exhibit 42 offered by Union Electric.

CONCLUSIONS OF LAW

1. The Court has jurisdiction in this case pursuant to Section 386.510 RSMo 1978.

2. The Court concludes that Section 393.135 RSMo 1978, prohibits Union Electric from recovering the costs associated with the construction of the cancelled Callaway II nuclear facility through its rates charged to Missouri customers. That section of the Revised Statutes of Missouri clearly and unambiguously prohibits any charge based on the costs of construction in progress and, dispositive of this issue, any charge based on "... <u>any other cost associated with owning, operating, maintaining, or financing any property before it is fully operational and used for service</u>."

3. The Court concludes that the operation of Section 393.135 in prohibiting the recovery by Union Electric of the costs associated with the construction of

the cancelled Callaway II nuclear facility does not violate the due process clauses of the United States and Missouri constitutions. Cleveland Electric Illuminating Company v. Public Utilities Commission of Ohio, 104 S Ct 47 (1983).

4. The Court concludes that the Order of the Public Service Commission does not violate the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 2 of the Constitution of Missouri. Williamson v. Lee Optical Company, 348 US 483 (1955); City of St. Louis v. Liberman, 547 SW2d 452 (Mo banc 1977); McClellan v. Kansas City, 379 SW2d 500 (Mo banc 1964).

5. The Court concludes that the Order of the Public Service Commission

properly excluded from evidence Exhibit 42, proffered by Union Electric.

6. The Court concludes that the Order of the Public Service Commission is supported by competent and substantial evidence and is reasonable and lawful in all respects.

WHEREFORE, it is Ordered, Adjudged, and Decreed, that the October 21, 1983, Order of the Commission is affirmed in all respects.

ss/Bryron L. Kinder
Byron L. Kinder
Circuit Judge, Division II

Dated: April 16, 1984

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company for an Emergency Increase in Rates and Charges for Electric Service	)))))	Case No. 81-898-EL-AEM

OPINION AND ORDER

The Commission, coming now to consider the application for emergency rate relief filed by Ohio Edison Company on July 30, 1981, pursuant to Section 4909.16, Revised Code, the exhibits filed therewith, and the Stipulation and Recommendation signed by its Staff and by other parties as described below; and being otherwise fully advised in the premises, hereby issues its Opinion and Order.

APPEARANCES

Under the provisions of the Stipulation and Recommendation discussed below, the parties to the Company's permanent rate application (Case No. 80-1139-EL-AIR) and the applicant for intervention, E. Ray Davis et al., wish to be treated as intervenors in this emergency case. Those parties, as well as the Staff of this Commission, make the following appearances:

Mr. Russell J. Spetrino, Miss Frances McGovern and Mr. Anthony J. Alexander, 76 South Main Street, Akron, Ohio 44308, on behalf of Ohio Edison Company.

Mr. William J. Brown, Attorney General, by Mr. Marvin I. Rosnik and Mr. James R. Bacha, Assistant Attorneys

General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Staff of the Public Utilities Commission of Ohio.

Mr. Richard M. Fanelly, Special Legal Counsel, for the City of Akron, 621 Centran Building, Akron, Ohio 44308, on behalf of the City of Akron.

Mr. Edward M. Zaleski, Lorain Law Director, by Mr. Stephen B. Angel, Special Utilities Counsel, 200 West Erie Avenue, Lorain, Ohio 44052, on behalf of the City of Lorain.

Mr. William A. Spratley, Consumers' Counsel, by Mr. Richard P. Rosenberry, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio 43215, on behalf of the Residential Consumers of Ohio Edison Company.

Messrs. Steer, Strauss, White & Tobias, by Mr. Theodore K. High, 2208 Central Trust Tower, Cincinnati, Ohio 45202 and Mr. John A. DiNardo, Assistant Counsel, P.O. Box 600, Middletown, Ohio 45042, on behalf of Armco Inc.

Mr. Wayne L. Emery and Mr. Kenneth R. Pepperney, 600 Grant Street - Room 1569, Pittsburgh, Pennsylvania 15230, on behalf of United States Steel Corporation.

Bell & Clevenger Co., L.P.A., by Mr. Langdon D. Bell, 21 East State Street, Columbus, Ohio 43215, on behalf of General Motors Corporation and PPG Industries, Inc.

Messrs. Muldoon, Pemberton & Ferris, by Mr. Boyd B. Morris, 50 West

Broad Street, Columbus, Ohio 43215, on behalf of Ray Davis et al.

Introduction:

Ohio Edison Company (hereinafter referred to as the applicant, the company, or Ohio Edison) is an Ohio corporation engaged in the generation, transmission and distribution of electric energy and is a public utility and an electric light company within the definitions of Sections 4905.02 and 4905.03(A)(4), Revised Code. On July 30, 1981, the company filed the instant application pursuant to Section 4909.16, Revised Code, praying that the Commission find an emergency exists as to the company, and, to prevent injury to the business or interests of the public or of the company, that the company be authorized

to place into effect on bills rendered on and after August 1, 1981, an increase of $90,000,000 on an annualized basis over the revenue at current rates, including the provision for recovery of fuel costs, based on the six months actual-six months estimated billing determinants as set out in the company's E-4 schedules in its application for a permanent rate increase in Case No. 80-1139-EL-AIR. The temporary rate would apply to all current customer classes.

On December 1, 1980, the company began the statutory process of seeking permanent rate increases by giving notice of its intention to file an application for an increase in rates pursuant to Section 4909.43(B), Revised Code. The notices were docketed under

Case No. 80-1139-EL-AIR. The increase sought in the permanent rate case amounts to approximately $138,000,000 over currently authorized revenues based on a test year ending August 31, 1981, or approximately $139,000,000 based on a fully forecasted test year ending June 30, 1982. Ohio Edison proposed that the temporary increase remain in effect until a permanent increase is authorized by the Commission. An Opinion and Order in the permanent case is expected to be issued on or about December 1, 1981.

Ohio Edison alleges that its poor financial condition was unexpectedly and extensively exacerbated by the prospective need to write off $52,495,829 as of September 30, 1981, as a result of the decision on July 15, 1981, of the

Ohio Supreme Court in Consumers' Counsel v. Pub. Util. Comm., 67 Ohio St. 2d 153, that, while the Court did not disturb the finding of the Commission that the decision of the CAPCO companies to embark on the construction of the nuclear units and the decision to terminate construction were reasonable, given the uncertainties that now attend the construction of nuclear units and the intervening decline in growth expectations, the costs incurred by The Cleveland Electric Illuminating Company in conjunction with the termination of construction of the four units were not properly includable for rate purposes as ordinary operating expenses under Section 4909.15(A)(4), Revised Code. Pursuant to this Commission's Opinion and Order in Case No.

80-141-EL-AIR, Ohio Edison is currently recovering an amount required to permit amortization of 1/10 of the estimated jurisdictional cost, net of tax, incurred by Ohio Edison in conjunction with termination of the same four units. The circumstances in the Consumers' Counsel decision, supra, are so similar as to suggest that allowance to Ohio Edison, the principal owner of the four units, of its share of the costs of the units will also be disallowed. Its independent auditors, which have already qualified their opinion with respect to the Company's earnings as of June 30, 1981, have advised that, in accordance with generally accepted accounting principles, the entire unamortized loss to Ohio Edison must be written off if the decision

stands. As far as the investment community is concerned, this imminent loss has already taken place.

The company also alleges that following the decision in Consumers' Counsel, supra, it was obliged to withdraw its offering of $75,000,000 in first mortgage bonds which had already been priced at a 16-7/8% coupon rate to aid it in paying off $150,000,000 in 10% bonds due August 1, 1981. The company was also forced to cancel a scheduled August sale of 7,000,000 shares of common stock intended to produce approximately $84,000,000. The write-off of the loss will immediately reduce, dollar for dollar, the unrestricted retained earnings of the company available to pay common stock dividends and further reduce the

company's already low common equity component of permanent capitalization which is already increasing the risk to common stock investors and the cost of common capital to the company. In its present circumstances the company is virtually precluded from gaining any access to the market for the permanent capital financings and is forced to rely on costly short-term bank borrowings. The amount of such borrowings is limited by the company's charter and will be at the limit by the end of 1981 if emergency relief is not granted. Access to permanent capital is critical to the ability of the company to provide adequate and reliable service to customers and something approaching $235,000,000 in proceeds from external financing with

permanent capital is needed still in 1981. Given the company's ongoing need for access to the public markets for capital and the practical inability to "catch-up" with deferred financings added to what will be required to be scheduled in 1982, the company must receive substantial emergency relief if it is to be able to attempt to issue new permanent capital in 1981 before short-term unsecured capital limitations are reached. While it is not so much indenture and charter limitations limiting access to the capital market as the perception of the market of the unsettling effect on Ohio Edison of having to write off an immense loss immediately instead of amortization of the amount over ten years, the company also states that it

has no interest and dividend coverage leeway under its charter that will permit issuance of preferred stock and that its interest coverage required under its indenture to be at least 2X including coverage of interest on any new issue, is currently 2.07. Perceiving the potential impact on the company of its inability to gain access to the market for permanent capital, the intervenors in the company's pending permanent rate case, Case No. 80-1139-EL-AIR, recognized that accelerated recovery of an agreed sum of $90,000,000 to settle issues as to revenue in the pending permanent rate case, might serve to alleviate the company's financial circumstances.

Attached to the company's application for temporary emergency rate

relief, as Exhibit A, is a Stipulation and Recommendation signed by all parties who are intervenors in the company's permanent rate case, as well as by a party applying to intervene. The Stipulation and Recommendation is also signed on behalf of the Staff of this Commission respecting certain matters stipulated and recommended therein.

The Stipulation recommends, inter alia, that Ohio Edison be permitted to recover on bills rendered on and after August 1, 1981, the sum of $90,000,000, which does not include any continued amortization of costs associated with the construction and subsequent termination of the four generating units, in full settlement of issues as to revenue requirements in the company's pending

permanent rate case. Since, however, it was judged that the permanent rate case cannot be finally adjudged until after issuance in that case of a Staff Report of Investigation, service of the report, a thirty day period to receive objections and a hearing, the parties also agreed that the company should file an application for emergency relief to effectuate the Stipulation and Recommendation, that the emergency increase should be effective on bills rendered on and after August 1, 1981, that, as evidenced by information and data provided in the company's emergency application (previewed by parties), the company is in a financial emergency as that term has been used by the Commission in prior decisions, that the magnitude of relief agreed to is

not unreasonable as emergency relief, given the company's present situation and further financing requirements and is less than the company states it otherwise would have requested in the absence of agreement of the parties, and that the emergency rates should be the rates set out in Exhibit No. 1 to the Stipulation and Recommendation.

The Stipulation also recommends the severing and separate determination of issues of revenue distribution and rate design in Case No. 80-1139-EL-AIR and, as between the Office of Consumers' Counsel and Ohio Edison, calls for severing and separately determining, after a special hearing, whether the Commission should order a management audit pursuant to Section 4909.154, Revised Code, as

requested by the Consumers' Counsel in a pending motion in Case No. 80-1139-EL-AIR.

The Stipulation further provides that it is not to be binding upon the parties in any other proceedings than those which are required to effectuate the Stipulation.

Finally, it was agreed that should the Commission reject all or any part of the agreement and recommendations offered therein, the Stipulation and Recommendation shall be of no force and effect.

Commission Review and Discussion:

The Commission's authority to order modifications of existing rates on a temporary basis arises under Section

4909.16, Revised Code, which provides as follows:

> When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time as the commission prescribes.

The Supreme Court of Ohio has consistently construed this statute as vesting the Commission with broad discretionary power in determining when an emergency exists and in tailoring a

remedy which will enable the public utility concerned to meet that emergency. Cambridge v. PUCO (1953), 159 Ohio St. 88; Manufacturer's Light & Heat Co. v. PUCO (1955), 163 Ohio St. 78.

The Commission is guided by the following considerations when confronted with a request for emergency rate relief: (a) emergency rate relief is "extraordinary" in nature; (b) the existence of an "emergency" is a condition precedent to temporary rate relief; (c) temporary rate relief will be granted only at the "minimum level" necessary to avert or relieve the emergency; (d) the applicant's evidence will be reviewed with the "strictest scrutiny" and that evidence must "clearly and convincingly"

demonstrate the presence of "extraordinary circumstances" which constitute a genuine emergency situation; and

(e) emergency rate relief will not be granted under Section 4909.16, Revised Code, if the emergency request was filed merely to circumvent and as a substitute for permanent rate relief under Section 4909.18, Revised Code.

The primary question is simply whether, absent temporary rate relief, the utility's ability to render service will be impaired or the utility will be financially imperiled. If the utility fails to sustain its burden of proof on this issue, the Commission's inquiry is at an end. See Toledo Edison, Case No. 76-439-EL-AEM (Opinion and Order, September 8, 1976).

The Commission is persuaded and finds that the requisite considerations have been met in this case. Moreover, it has never had before it a case in which the timing of relief was of such grave importance and in which parties representing a diversity of interests and viewpoints and the Staff of the Commission have all agreed not merely to the level of temporary emergency relief needed but also as to the need to grant emergency relief forthwith and to make it immediately effective.

Notwithstanding the swiftness of the Commission's action, it is not ill-considered in the circumstances.

The company has supplied as Exhibit B a projected income statement for 1981, a projected cash flow statement

for 1981, and a measurement of unsecured indebtedness as against charter limitations on that indebtedness for the same period. The data, as to which no question of reliability has been raised and which is based in substantial part on actual data recorded on the books of the company and on the known obligation of the company to write off $52,495,829 as of September 30, 1981, on the advice of the company's independent auditors, reveals that a $150,000,000 10% bond issue must be refunded August 1, 1981, and must be replaced in the company's existing circumstances with high cost, short term debt approximating a cost rate of 20%, that the estimated direct short term indebtedness will range from $289,000,000 to $382,000,000 between

August and December, 1981, and that by year end 1981, the company will have effectively reached the limitation under its charter relating to unsecured indebtedness absent permanent financing to partially relieve this burden. Moreover, the information indicates that the write-off of almost $52.5 million may jeopardize the continued stock dividend payment of the company and thus indirectly serve as a practical impediment to the company in raising permanent debt or equity capital for its on-going construction program, which includes funding for the environmental control program underway.

The Commission is, of course, not bound by the Stipulation and Recommendation presented to it by its Staff

and the parties. However, a joint recommendation made by the Staff and the parties in circumstances such as these is entitled to careful consideration and should not be lightly regarded. It is impressive that there is unanimous concurrence in the conclusion that $90,000,000 in emergency relief is immediately needed. While ordinarily in emergency cases the Staff is not able to conduct as detailed an investigation as it does in permanent cases, in this case, the Staff has been investigating the Company's financial condition in connection with the permanent application for nearly five months. Under these circumstances, the Staff's stipulation and recommendation regarding the need for emergency relief is even more persuasive.

It is not the custom of the Commission to act without prior hearing and the taking of testimony in emergency cases nor would it ever do so except in extraordinary circumstances. In the opinion of the Commission, however, extraordinary circumstances exist in this case to justify such a course of action, including not merely the urgency of the need for emergency action but also the effective participation of all parties normally taking part in Ohio Edison rate cases. Moreover, the Commission believes summary action is lawful. Section 4909.16, Revised Code, not only does not require a hearing, but the fact that no provision was made by the legislature for a hearing may well be an acknowledgment that the ability of the Commission to act

promptly in emergency circumstances is an essential feature of its authority under Section 4909.16, Revised Code, for it cannot be doubted that in some circumstances the best means of containing an emergency at overall lowest cost to customers is to grant relief as swiftly as possible. Accordingly, the Commission concludes that a temporary emergency increase should be granted forthwith. Moreover, the existence of an emergency cannot be in doubt. It is clear that the funds needed by Ohio Edison to finance the enterprise must come from external sources under present rates. It is equally clear that undue reliance by the company on short-term unsecured borrowing, particularly at the high cost prevailing today, cannot only create a

crisis of investor confidence but, in so doing, reduce the future ability of the company to finance essential requirements at reasonable cost to ratepayers.

When, moreover, there is the sudden occurrence of an unexpected event that has forced the withdrawal of proposed issues of bonds and common stock and has destroyed, for all practical purposes, the ability of the company to resort to the market for permanent financing, the Commission is bound to recognize in the interests of ratepayers that untoward measures to cope with the emergency are in order. It can but hope that prompt relief, which will maximize receipts in 1981, the year of extraordinary loss, and that the level of relief granted, as requested by the company and

concurred in by the Staff and all parties, will prove to be adequate.

Upon review of the evidence supplied by the company and the Stipulation and Recommendation of the Staff and the parties, the Commission finds that an emergency exists which, without rate relief, will imperil the company's ability to provide adequate and reliable electric service consistent with its duty as a public utility. We accept the recommendations to the Commission in the Stipulation and Recommendation in so far as they relate to the granting of emergency relief. While the Stipulation and Recommendation also encompasses stipulations and recommendations relating to the permanent rate case, which was used as a vehicle to establish a proper level of

interim emergency relief, those matters must be finally reviewed and determined in the permanent rate case, Case No. 80-1139-EL-AIR. Only the recommendation in the Stipulation and Recommendation that a hearing should be held on whether the Commission should order a management audit as requested in Case No. 80-1139-EL-AIR can be addressed at this time. In light of the allegations contained in the company's emergency application and based on the motion for a management audit filed by the Office of Consumer's Counsel in Case No. 80-1139-EL-AIR, the Commission believes that a management audit should be conducted and will so order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1) Ohio Edison Company is an Ohio corporation and a public utility engaged

in the construction of generating, transmission, distribution and other facilities required to furnish adequate and reliable supplies of energy to its customers now and in the future.

2) The company is a public utility as defined in Sections 4905.02 and 4905.03, Revised Code, and is subject to the jurisdiction of the Commission pursuant to Sections 4905.04, 4905.05 and 4905.06, Revised Code.

3) The applicant filed the instant application for emergency rate relief pursuant to the provisions of Section 4909.16, Revised Code, on July 30, 1981.

4) The inability of the company to obtain permanent capital and to rely entirely on short-term unsecured borrowings at high cost and in amounts

approaching the company's charter limitations on its ability to raise such capital, will injure the business or interests of the public and the company and constitutes an emergency within the meaning of Section 4909.16, Revised Code.

5) The immediate suspension of existing rates and authorization to the company to file new rates producing a $90,000,000 increase effective immediately on bills rendered on and after August 1, 1981, will ameliorate the emergency.

6) Absent such a level of emergency rate relief effective immediately, the ability of the company to render adequate service at reasonable cost to its customers will be impaired. The company's

financial integrity will be jeopardized and the public interest will be injured.

7) An increase in Ohio Edison's current rates by $90,000,000 on an annualized basis effective on bills rendered on and after August 1, 1981, is the minimum amount necessary to enable the company to meet the emergency condition.

8) The Commission, pursuant to Section 4909.16, Revised Code, has the authority under the circumstances herein to grant emergency rate relief as to all rates established by this Commission.

9) Evidence of sufficient reliability was presented to allow the Commission to determine whether the company's circumstances constitute an emergency.

ORDER:

It is, therefore,

ORDERED, That the company be authorized to place in effect the rate schedule attached to the Stipulation and Recommendation as Exhibit No. 1. Such rates shall remain in effect until the Commission orders otherwise or new rates go into effect by operation of law. It is, further,

ORDERED, That the company shall file as soon as possible three (3) original revised rate schedules reflecting the rates authorized herein. It is, further,

ORDERED, That these revised sheets be clearly designated as "emergency and temporary." It is, further,

ORDERED, That the effective date of such schedules shall be August 1,

1981, and will be applicable to bills rendered on and after that date. It is, further,

ORDERED, That there shall be conducted a management audit of the company. The Commission will issue an appropriate order in the near future instituting such a procedure. It is, further,

ORDERED, That a copy of this Opinion and Order be served on all those having entered appearances in this matter, as listed above.

THE PUBLIC UTILITIES COMMISSION OF OHIO

ss/ _____
(Chairman)

ss/ _____

ss/ _____
(Commissioners)

Entered in the Journal
July 31, 1981

A True Copy

ss/_____
David N. Polk
Secretary

No. 79-1929
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT III

WISCONSIN PUBLIC SERVICE CORPORATION,

Petitioner-Respondent,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN,

Appellant.

APPEAL from an order[1] of the circuit court for Brown County: ROBERT J. PARINS, Judge. Reversed.

Before Foley, P.J., Dean and Cane, JJ.

DEAN, J. The Public Service Commission of Wisconsin appeals from an order that remands a March 2, 1979, PSC order (hereinafter the Order) that directs WPS to place on its books certain

expenditures incurred in seeking authority to construct a two-unit nuclear power generating facility in the Town of Koshkonong in Jefferson County. The Order was separate and distinct from any rate proceeding. The circuit court determined that the PSC's method of accounting, which precluded the expenses from appearing as operating expenses on the books of the utilities in any rate case test year, was inconsistent with the PSC's finding that the expenses were prudently made and not chargeable to the stockholders. We conclude that the PSC did not abuse its discretionary authority to direct the manner and form in which the utilities keep their books and that the Order does not confiscate utility property. We therefore reverse the order

of the trial court and reinstate the PSC Order directing the utilities to write off $7.5 million in nuclear power plant development costs.

On July 10, 1974, Wisconsin Public Service Corporation and three other utilities submitted to the PSC a joint application for authority to construct and put into operation power generating facilities at Koshkonong, Wisconsin. In 1977, the applicants withdrew their application with the consent of the PSC. Prior to withdrawal, the utilities spent $34,898.362.29 developing their application, an amount which they expected to capitalize when the project was completed. The costs were accrued, and the expenditures did not appear on

the utilities' books as operating expenses during the years 1974 to 1977.

The PSC held hearings relating to the accounting treatment of the costs while the Koshkonong application was pending and after the application's withdrawal. The proceedings culminated in the PSC's Order of March 2, 1979, which directed the accounting of the $33,881.244.86 in expenditures.[2] WPS contested the accounting treatment with respect to its share of $7,526,324.66 in expenditures, and the other three applicants[3] join WPS on appeal as intervenors.

We consider first whether the case is moot because WPS has submitted and received consideration on a rate increase application subsequent to the March 2, 1979, Order.[4] A case is moot

when "a determination is sought which, when made, cannot have any practical effect upon an existing controversy."[5] In Wisconsin Association of Manufacturers & Commerce, Inc. v. PSC, 100 Wis2d 300, 301 NW2d 247 (1981), a controversy involving a rate order was found moot because a subsequent rate order had been entered. This case, however, involves an accounting order. If we were to affirm , the case would be remanded to the PSC to make its order consistent with its findings as directed by the trial court. WPS contends that the PSC can, and does, order utilities to retroactively adjust their books to conform to an accounting order.[6] The PSC also could order the $7.5 million in expenditures amortized over a period of years to commence at the

beginning of the next rate case test year.[7] If upon remand the PSC ordered the expenditures removed from the account to which they were charged and charged to that account to commence with the beginning of the next rate case test year, then the expenses would appear as reasonable and prudent expenses in addition to all other reasonable and prudent expenses in the rate case test year. At that time, WPS could request higher rates than would otherwise be approved to cover its costs relating to the $7.5 million in expenditures. We conclude that the case is not moot.

We turn to the merits of the case. The legislature has delegated to the PSC the power to prescribe the manner and form in which utilities keep their

books and records.[8] The legislature has provided for review in the circuit court of such an administrative decision.[9] Section 227.20(8), Stats., required the circuit court to:

> reverse or remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; is inconsistent with an agency rule, an officially stated agency policy or a prior agency practice, if deviation therefrom is not explained to the satisfaction of the court by the agency; or is otherwise in violation of a constitutional or statutory provision; but the court shall not substitute its judgement for that of the agency on an issued of discretion.[10]

The legislature provided for further review of the final judgment of the circuit court by appeal to the court of appeals.[11] On appeal, this court is only

to determine whether the circuit court erred in its determination.[12]

When the circuit court concluded that the Order was inconsistent with its findings, it concluded that the PSC's action was not explained to the satisfaction of the court. WPS also argues that the Order is inconsistent with prior agency practice and is otherwise is violation of constitutional provision. We first consider whether the circuit court correctly concluded that the Order inadequately justifies its action and then consider WPS's arguments. We conclude that the Order was not inconsistent with its findings, that the Order adquately justified its exercise of discretion, and that the Order did not confiscate utility property.

To determine whether the circuit court erred, we consider the basis for the circuit court's decision. The circuit court reviewed the record and determined that substantial evidence supported findings made by the PSC in the Order. The circuit court accepted as fact that the monies were spent and that the expenditures had no value to the utilities or ratepayers. More importantly, it accepted that the expenditures were reasonably and prudently made in the planning for customer service and that, consequently, they were not "to be charged against the stockholders on the books of the company." The court also accepted that the write-off would reduce WPS earnings per share by $.06, in

comparison to 1978 annual earnings per share of $2.54.

The circuit court determined that the Order amortized the expense in twelve months and that, as a practical matter, the write-off would not permit expenses to appear on the utilities' books in a rate case test year. The court also determined that the expenditures were not of the type routinely written off and that these types of expenditures usually were amortized over periods of time longer than one year. In addition, the court determined that the PSC had policy reasons for choosing a one-year period, including (1) that sound, conservative accounting practice requires prompt early removal of items without value from the utilities' books;

(2) that the impact on stockholders was not significant; (3) that tax benefits reduced the impact of losses on stockholders; (4) that the PSC anticipated introducing a policy of treating precertification planning expenditures as operating expenses; and (5) that a change of policy concurrent with longer term amortizastion of past expenditures would cumulatively burden current ratepayers. In spite of these policy reasons for one-year amortization, the circuit court concluded that the Order was inconsistent with its findings because, although the expenditures were "not to be charged to stockholders," the practical effect of the write-off, which precluded recovery in rates, was to place the entire burden of the expenditures on stockholders.[13]

We agree with the circuit court that the PSC chose one-year amortization periods for sound policy reasons, but we conclude that the circuit court erred when it concluded that the one-year amortization period was inconsistent with the Order's findings. In the Order, the PSC stated: "The fact that ... [the $7.5 million in expenditures] were not found imprudent means that they will not be charged against the stockholders on the books of the company." [Emphasis supplied.] The circuit court reduced this statement to a finding that the expenditures were not be "charged against the stockholders."

The circuit court created the inconsistency that it found troublesome by reducing "charged against stockholders

on the books of the company" to "charged against stockholders." The expenditures were not "charged against stockholders on the books of the company"; a comparison of the treatment of $45,228.82 in imprudent advertising expenditures that were "charged against stockholders on the books of the company" and the treatment of the $7.5 million in expenditures supports this conclusion.

Prior to the Order, both the $45,000 in advertising expenditures and the $7.50 million in other expenditures were accrued in account 186, miscellaneous deferred debits.[14] When amortized, the $7.5 million in expenditures were transferred to account 407, classifying them as operating expenses. In contrast, the order transferred the $45,000 worth

of advertising expenses, which were imprudent and chargeable to stockholders, to account 426, classifying them as "miscellaneous income deduction." There is an ultimate difference in treatment. On the one hand, if any month in which the $7.5 million in expenditures appeared on the books had been part of a rate case test year, these expenses would have been included in those expenses used to estimate the cost of operation for the purpose of establishing rates. On the other hand, if the $45,000 had been on the books in a rate case test year, the expenses would not be included in operating costs upon which rates would be based. We conclude that the $7.5 million in expenditures were not charged against

the stockholders on the books of the company because of this difference.

WPS argues that the Order is arbitrary and capricious for reasons other than the reason upon which the circuit court based its order.[15] WPS contends that the PSC practice was to amortize losses over periods longer than one year. If amortized over three, five or ten years, then the losses would appear in a rate case test year, and the utilities would subsequently have the opportunity to recover losses in rates. WPS concludes that the Order is inconsistent with prior agency practice because it precluded recovery in rates.

WPS cites numerous other cases and orders to establish that PSC practice is to amortize losses over periods longer

than one year. The examples include PSC orders involving other types of losses,[16] other orders in the same docket,[17] and orders made by other public service commissions relating to precertification expenditures from abandoned projects.[18] We do not agree that such examples establish PSC practice in this type of case.

At the same time, the one-year write-off is an express deviation from the past practice, which capitalized such expenses in the cost of completed projects, and is different from the expressly anticipated policy of treating precertification expenditures as operating expenses.

The PSC has authority to direct the manner and form in which the utilities maintain their books. Section

196.06, Stats. The circuit court is authorized to reverse or remand an order exercising that authority if an order is inconsistent with agency practice, but only if the deviation is not explained to the satisfaction of the court. Moreover, the statute directs the court not to substitute its judgment for that of the agency. Section 227.20(8), Stats. The circuit court recognized that the PSC justified its choice of a one-year amortization period with policy reasons. We concur with the circuit court that the policy reasons stated in the Order are sound. In light of the policy reasons supporting the PSC's exercise of discretion, the Order should not be reversed or remanded because it is inconsistent with prior agency practice.

WPS also contends that the Order violates fourteenth amendment due process. WPS phrases its argument in plain language: "The flaw in the order is that it requires the joint applicants to write off prudent expenditures in such a way that the utilities will never have the opportunity to recover these expenditures from rate payer."[19] WPS's due process contention is not a procedural due process objection,[20] but it contends that the Order deprives the utilities of property without compensation. In an explanation of ratemaking, WPS states: "Rather than guaranteeing a rate of return for utilities, rates set the maximum price which can be charged. If everything goes as projected in the test year, then the utility will have just an

opportunity to earn the rate of return authorized."[21] [Emphasis in the original.] From this statement, we understand that when WPS contends that it must have an opportunity to recover losses, it argues that the losses must be included in the expenses of a rate case test year used to establish rates.

WPS cites numerous cases[22] for the principle that a public service commission cannot exclude from the rate base regular, reasonable and prudent expenses incurred in the test year. Each of the cases cited is a rate case. The issue of whether an expense must be included in a rate base is distinguishable from the issue of whether the PSC properly exercised its discretion in

ordering expenses amortized over a one-year period rather than over a three- or five-year period. WPS, thus, misplaces its reliance on the authority it cites.

Both WPS and PSC cite Transcontinental Gas Pipe Line Corp. v. FPC, 518 F2d 459 (DC Cir 1975), in support of their position. In Transcontinental, the court approved a Federal Power Commission accounting order. The order permitted the recovery in rates of advance payments made by gas pipeline companies to gas producers to finance gas exploration and development. WPS argues that because the FPC permitted recovery of costs to the pipeline companies, the PSC must permit recovery of costs to the utilities in this case.

In Transcontinental, the court did not affirm the order because the order permitted recovery of costs. The recovery of pipeline costs was not at issue. Instead, the issue in Transcontinental was whether the pipeline should earn a profit on the value of the advance payments. This issue is not relevant to our case.

We agree with the PSC that the Transcontinental opinion describes the role of a reviewing court when a utility claims that a public service commission accounting order constitutes an unconstitutional confiscation of property:

> In judging in a rate proceeding whether an unconstitutional confiscation of property has occurred, the Commission and the reviewing court must compare the total rate of

> return to the value of dedicated property as a whole. ...
>
> Such a test in a rate proceeding leads to the conclusion that in an attack on individual accounting rules, the reviewing court must defer to agency expertise. ...
>
> We think the petitioner bears a heavy burden when it challenges FPC accounting regulations on the grounds that they result in an unconstitutional confiscation of property. The effect of the accounting rules should not be viewed and analyzed piecemeal, as Transco would have us do in this case. Rather, the Commission should be free to fashion individual accounting rules unless a rule ... would clearly and necessarily have the effect of rendering any rate, which is based upon the rule's use, confiscatory in the constitutional sense.[23]

Transcontinental applied the standard of review for rate orders to accounting orders. An accounting order constitutes an unconstitutional confiscation of

property if, when applied, it reduces the total rate of return to the value of the dedicated property as a whole to an unreasonable level.

WPS does not argue that its 1979 rate of return was reduced to an unreasonable level by the accounting order. Among the findings of the PSC in the Order, the PSC determined that the annual earnings per share for WPS could be reduced $.06. The PSC compared this amount to WPS's 1978 annual earnings per share of $2.54, and it concluded that the amount was insignificant. This conclusion is within the PSC's sphere of expertise, and we defer to the expertise of the PSC.[24] We conclude that the order does not constitute an unconstitutional confiscation of property.

By the Court.--Order reversed.

Not recommended for publication in the official reports.

APPENDIX

[1] The Wisconsin Supreme Court determined on a prior appeal that this order was a final order from which an appeal could be taken. Bearns v. DILHR (WPS v. PSC), 102 Wis 2d 70, 306 NW2d 22 (1981).

[2] In a prior order, the difference between $34,898,362.29 and $33,881,244.86, representing cost of land, was reclassified to an account entitled "non-utility property."

[3] The other joint applicants are Wisconsin Electric Power Company, Wisconsin Power & Light Company, and Madison Gas and Electric Company.

[4] At oral argument, this court presented to the parties the question of mootness. The parties were subsequently permitted to file supplemental briefs on this question.

[5] City of Racine v. J-T Enterprises of America, Inc., 64 Wis 2d 691, 700, 221 NW2d 869, 874 (1974).

[6] WPS cites to the court an example of such an order and includes a copy of it in its appendix. Letter from PSC to WEPCO (March 30, 1977) in which the PSC directs WEPCO to modify its accounts of January 1977.

[7] Subsequent to the March 2, 1979 Order, the PSC has ordered expenses relating to the Haven power facility amortized "starting with the completion of the next rate case by each applicant." Public Service Comm'n order of February 14, 1980 in Docket No. 05-CE-3 (Haven order).

[8] Section 196.06, Stats.

[9] Section 227.20, Stats.

[10] Other subsections of § 227.20 provide grounds for reversal or remand of administrative decisions, but the other grounds are not relevant to this appeal.

[11] Section 227.21, Stats.

[12] Seebach v. PSC, 97 Wis 2d 712, 717, 295 NW2d 753, 757 (Ct App 1980).

[13] In reaching its conclusion that the expenditures were charged to shareholders, the circuit court adopted the reasoning of WPS. WPS described its financing as having only two sources: stockholders and ratepayers. Since the

amortization in one year had the practical effect of precluding the expenditures from appearing on the utilities' books in a rate case year, the expenditures were not charged to ratepayers. The circuit court, then, was forced to accept the conclusion that the expenditures were charged to stockholders.

The same reasoning can be used to conclude that the expenditures were charged to ratepayers. For example, when the expenditures were charged to accounts, they were charged to operating accounts. Since stockholder equity is not used to pay operating expenses, the expenditures were not charged to stockholders. Therefore, the expenditures were charged to ratepayers. Since the same reasoning can produce either conclusion, the reasoning is defective.

Moreover, the reasoning creates conceptual difficulty because it appears to set rates retrospectively. Rates are only set prospectively. The PSC found that these monies were spent and were of no value to ratepayers. Yet, WPS contends that in order not to charge shareholders, future rates must permit the opportunity to recover the costs from ratepayers. If such recovery is permitted, future ratepayers pay for previously incurred costs. The ratemaking, then, is made retrospectively for those costs.

[14] The account numbers refer to accounts in the Uniform System of Accounts. The Uniform System of Accounts is an accounting system developed by the National Association of Regulatory Utility Commissioners and used by the PSC to provide a format for utility bookkeeping. Section 227.01(11)(s), Stats., exempts the PSC from promulgating the system as an administrative rule.

[15] In WPS's brief-in-chief and at oral argument, WPS stressed that the March 2, 1979 Order directed the utilities to amortize expenditures retroactively to January 1979. Counsel's stress on retroactivity implied that it is objectionable. Since WPS argues for purposes of the mootness issue that retroactive accounting orders are accepted practice, we do not consider any question relating to retroactivity.

[16] For example, WPS cites: In Re Northern States Power Co., 83 PUR3d 176, 2-U-744 (1970); In Re Bonduel Tele. Co., 87 PUR2d 107, 2-U-6986 (1970); Application of the City of Two Rivers, 42 PSCW Rep 420, 2-U-4790 (July 29, 1957). Brief for respondent, at 10-11.

[17] For example, WPS cites: PSC order, Koshkonong Docket, October 18, 1974; PSC order, Docket 05-CE-3, February 14, 1980.

[18] For example, WPS cites: Petition of Consolidated Edison of New York, Inc., Case No. 9187; Petition of New York State Elec. & Gas Co., Rate Case No. 26763; Application of Virginia Elec. & Power Co., Case No. 19960 (March 19, 1979); Application of Consumers Power Co., Case No. F-700; Application of Consumers Power Co., Case No. U-4840; 14 PUR 4th 370, 391; Application of the Detroit Edison Co., Case No. F-762; Application of San Diego Gas & Elec. Co., Decision No. 90405 (June 5, 1979). Brief for respondent, at 20-22.

[19] Brief for respondent, at 3.

[20] The requirements of procedural due process are notice and hearing. Mid-Plains Tel., Inc. v. PSC, 56 Wis 2d 780, 785-86, 202 NW2d 907, 909-10 (1973). The record shows that both requirements are well satisfied.

[21] Brief for respondent, at 6.

[22] For example, WPS cites:

> New England Telephone and Telegraph Company v. Department of Public Utilities, 121 NE2d 896 (Mass 1954); New England Telephone and Telegraph Company v. Department of Public Utilities, 275 NE2d 493 (Mass 1971); Central Maine Power Company v. Public Utilities

Commission, 136 A2d 726 (Maine 1957); New England Telephone and Telegraph Company v. Public Utilities Commission, 390 A2d 8 (Maine 1978); Boise Water Corporation v. Idaho Public Utilities Commission, 555 P1d 163 (Idaho 1976); Application of Wilmington Suburban Water Corporation, 211 A2d 602 (Del 1965); New England Telephone and Telegraph v. State, 64 A2d 9 (NH 1949); Petition of New England Telephone and Telegraph Company, 66 A2d 135 (Vt 1949); Application of Diamond State Telephone Company, 149 A2d 324 (Del 1959); Public Service Commission v. Ely Light and Power Company, 393 P2d 305 (Nev 1964). Brief for respondent, at 16.

[23] Transcontinental, 518 F2d at 465.

[24] Robertson Trans. Co. v. PSC, 39 Wis 2d 653, 657, 159 NW2d 636, 638 (1968).